# CUSTOMS BULLETIN AND DECISIONS

***Weekly Compilation of***

***Decisions, Rulings, Regulations, Notices, and Abstracts***

***Concerning Customs and Related Matters of the***

***Bureau of Customs and Border Protection***

***U.S. Court of Appeals for the Federal Circuit***

***and***

***U.S. Court of International Trade***

**VOL. 37** **JUNE 25, 2003** **NO. 26**

*This issue contains:*



DEPARTMENT OF HOMELAND SECURITY
BUREAU OF CUSTOMS AND BORDER PROTECTION

## NOTICE

The decisions, rulings, regulations, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the Bureau of Customs and Border Protection, Office of Finance, Logistics Division, National Support Services Center, Washington, DC 20229, of any such errors in order that corrections may be made before the bound volumes are published.

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# Bureau of Customs and Border Protection

## *General Notices*

[CBP Decision 03–01]

### CUSTOMS ACCREDITATION OF BSI INSPECTORATE AMERICA CORPORATION AS A COMMERCIAL LABORATORY

AGENCY: Customs and Border Protection, Department of Homeland Security

ACTION: Notice of Accreditation of BSI Inspectorate America Corporation of Garden City, Georgia, as a Commercial Laboratory.

SUMMARY: BSI Inspectorate America Corporation of Garden City, Georgia has applied to Customs and Border Protection under Part 151.12 of the Customs Regulations for an extension of accreditation as a commercial laboratory to analyze petroleum products under Chapter 27 and Chapter 29 of the Harmonized Tariff Schedule of the United States (HTSUS). Customs has determined that this company meets all of the requirements for accreditation as a commercial laboratory. Specifically, BSI Inspectorate America Corporation has been granted accreditation to perform the following test methods at their Garden City, Georgia site: (1) Distillation of Petroleum Products, ASTM D86; (2) Water in Petroleum Products and Bituminous Materials by Distillation, ASTM D95; (3) API Gravity by Hydrometer, ASTM D287; (4) Kinematic Viscosity of Transparent and Opaque Liquids, ASTM D445; (5) Sediment in Crude Oils and Fuel Oils by Extraction, ASTM D473; (6) Density, Relative Density (Specific Gravity), or API Gravity of Crude Petroleum and Liquid Petroleum Products by Hydrometer Method, ASTM D1298; (7) Water and Sediment in Fuel Oils by the Centrifuge Method, ASTM D1796; (8) Water and Sediment in Middle Distillate Fuels by Centrifuge, ASTM D2709; (9) Water in Crude Oil by Distillation, ASTM D4006; (10) Percent by Weight of Sulfur by Energy-Dispersive X-Ray Fluorescence, ASTM D4294; (11) Water in Crude Oils by Coulometric Karl Fischer Titration, ASTM D4928; and (12) Vapor Pressure of Petroleum Products, ASTM D5191. Therefore, in accordance with Part 151.12 of the Customs Regulations, BSI Inspectorate America Corporation of Garden City, Georgia is hereby accredited to analyze the products named above.

LOCATION: BSI Inspectorate America Corporation accredited site is located at: Miles Street, Georgia Port Authority Gate #2, Garden City, Georgia, 31408.

EFFECTIVE DATE: May 20, 2003

FOR FURTHER INFORMATION CONTACT: Arlene Faustermann, Science Officer, Laboratories and Scientific Services, Customs and Border Protection, 1300 Pennsylvania Avenue, NW, Suite 1500 North, Washington, D.C. 20229, (202) 927-1060.

Dated: May 20, 2003

DONALD A. COUSINS,
*Acting Executive Director,*
*Laboratories and Scientific Services.*

[Published in the Federal Register, June 10, 2003 (68 FR 34627)]

## PROPOSED COLLECTION; COMMENT REQUEST

APPLICATION FOR EXTENSION OF BOND FOR TEMPORARY IMPORTATION

AGENCY: Bureau of Customs and Border Protection, Department of Homeland Security.

ACTION: Proposed collection; comments requested.

SUMMARY: The Bureau of Customs and Border Protection (CBP) of the Department of Homeland Security has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995: Application for Extension of Bond for Temporary Importation. This is a proposed extension of an information collection that was previously approved. CBP is proposing that this information collection be extended without a change to the burden hours. This document is published to obtain comments form the public and affected agencies. This proposed information collection was previously published in the Federal Register (68 FR 5696) on February 4, 2003, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10.

DATES: Written comments should be received on or before July 11, 2003.

ADDRESSES: Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public bur-

den and associated response time, should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Department of Treasury Desk Officer, Washington, D.C. 20503. Additionally comments may be submitted to OMB via facsimile to (202) 395–7285.

SUPPLEMENTARY INFORMATION:

The Bureau of Customs and Border Protection (CBP) encourages the general public and affected Federal agencies to submit written comments and suggestions on proposed and/or continuing information collection requests pursuant to the Paperwork Reduction Act of 1995 (Pub. L.104–13). Your comments should address one of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the Proper performance of the functions of the agency/component, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies/components estimate of the burden of The proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collections of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

*Title*: Application for Extension of Bond for Temporary Importation

*OMB Number*: 1651–0015

*Form Number*: Customs Form–3173

*Abstract*: Imported merchandise which is to remain in the Bureau of Customs and Border Protection territory for 1-year or less without duty payment is entered as a temporary importation. The importer may apply for an extension of this period on Customs Form–3173.

*Current Actions*: This submission is being submitted to extend the expiration date.

*Type of Review*: Extension (without change)

*Estimated Number of Respondents*: 1,200

*Estimated Time Per Respondent*: 14 minutes

*Estimated Total Annual Burden Hours*: 348

*Estimated Total Annualized Cost on the Public*: $5,568

If additional information is required contact: Tracey Denning, Bureau of Customs and Border Protection, 1300 Pennsylvania Avenue NW, Room 3.2.C, Washington, D.C. 20229, at 202–927–1429.

Dated: June 3, 2003

TRACEY DENNING,
*Agency Clearance Officer,*
*Information Services Branch.*

[Published in the Federal Register, June 11, 2003, (68 FR 34995)]

## PROPOSED COLLECTION; COMMENT REQUEST

### APPLICATION AND APPROVAL TO MANIPULATE, EXAMINE, SAMPLE OR TRANSFER GOODS

AGENCY: Bureau of Customs and Border Protection, Department of Homeland Security.

ACTION: Proposed collection; comments requested.

SUMMARY: The Bureau of Customs and Border Protection (CBP) of the Department of Homeland Security has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995: Application and Approval to Manipulate, Examine, Sample or Transfer Goods. This is a proposed extension of an information collection that was previously approved. CBP is proposing that this information collection be extended with a change to the burden hours. This document is published to obtain comments form the public and affected agencies. This proposed information collection was previously published in the Federal Register (68 FR 5697–5698) on February 4, 2003, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10.

DATES: Written comments should be received on or before July 11, 2003.

ADDRESSES: Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Department of Treasury Desk Officer, Washington,

D.C. 20503. Additionally comments may be submitted to OMB via facsimile to (202) 395–7285.

SUPPLEMENTARY INFORMATION:

The Bureau of Customs and Border Protection (CBP) encourages the general public and affected Federal agencies to submit written comments and suggestions on proposed and/or continuing information collection requests pursuant to the Paperwork Reduction Act of 1995 (Pub. L.104–13). Your comments should address one of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the Proper performance of the functions of the agency/component, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies/components estimate of the burden of The proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collections of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

*Title*: Application & Approval to Manipulate, Examine, Sample, or Transfer Goods

*OMB Number*: 1651–0006

*Form Number*: Form–3499

*Abstract*: CBP Form–3499 is prepared by importers or consignees as an application to request examination, sampling, or transfer of merchandise under CBP supervision. This form is also an application for the manipulation of merchandise in a bonded warehouse and abandonment or destruction of merchandise.

*Current Actions*: This submission is being submitted to extend the expiration date, with a change to the expiration date.

*Type of Review*: Extension (with change)

*Estimated Number of Respondents*: 151,140

*Estimated Time Per Respondent*: 6 minutes

*Estimated Total Annual Burden Hours*: 15,114

*Estimated Total Annualized Cost on the Public*: $302,280

If additional information is required contact: Tracey Denning, Bureau of Customs and Border Protection, 1300 Pennsylvania Avenue NW, Room 3.2.C, Washington, D.C. 20229, at 202–927–1429.

Dated: June 3, 2003

TRACEY DENNING,
*Agency Clearance Officer,*
*Information Services Branch.*

[Published in the Federal Register, June 11, 2003, (68 FR 34996)]

## PROPOSED COLLECTION; COMMENT REQUEST

### DEFFERAL OF DUTY ON LARGE YACHTS IMPORTED FOR SALE

AGENCY: Bureau of Customs and Border Protection, Department of Homeland Security.

ACTION: Proposed collection; comments requested.

SUMMARY: The Bureau of Customs and Border Protection (CBP) of the Department of Homeland Security has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995: Deferral of Duty on Large Yachts Imported for Sale. This is a proposed extension of an information collection that was previously approved. CBP is proposing that this information collection be extended with a change to the burden hours. This document is published to obtain comments form the public and affected agencies. This proposed information collection was previously published in the Federal Register (68 FR 5695–5696) on February 4, 2003, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10.

DATES: Written comments should be received on or before July 11, 2003.

ADDRESSES: Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Department of Treasury Desk Officer, Washington, D.C. 20503. Additionally comments may be submitted to OMB via facsimile to (202) 395–7285.

SUPPLEMENTARY INFORMATION:

The Bureau of Customs and Border Protection (CBP) encourages the general public and affected Federal agencies to submit written

comments and suggestions on proposed and/or continuing information collection requests pursuant to the Paperwork Reduction Act of 1995 (Pub. L.104–13). Your comments should address one of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the Proper performance of the functions of the agency/component, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies/components estimate of the burden of The proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collections of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

*Title*: Deferral of Duty on Large Yachts Imported for Sale
*OMB Number*: 1651–0080
*Form Number*: N/A
*Abstract*: Section 2406(a) of the Miscellaneous Trade and Technical Corrections Act of 1999 provides that an otherwise dutiable "large yacht" may be imported without the payment of duty if the yacht is imported with the intention to offer for sale at a boat show in the U.S.
*Current Actions*: This submission is being submitted to extend the expiration date with a change to the burden hours.
*Type of Review*: Extension (with change)
*Estimated Number of Respondents*: 100
*Estimated Time Per Respondent*: 60 minutes
*Estimated Total Annual Burden Hours*: 100
*Estimated Total Annualized Cost on the Public*: $2,200.
If additional information is required contact: Tracey Denning, Bureau of Customs and Border Protection, 1300 Pennsylvania Avenue NW, Room 3.2.C, Washington, D.C. 20229, at 202–927–1429.

Dated: June 3, 2003

TRACEY DENNING,
*Agency Clearance Officer,*
*Information Services Branch.*

[Published in the Federal Register, June 11, 2003, (68 FR 34997)]

DEPARTMENT OF HOMELAND SECURITY,
OFFICE OF THE COMMISSIONER OF CUSTOMS.
*Washington, DC, June 11, 2003,*

The following documents of the Bureau of Customs and Border Protection ("CBP"), Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and CBP field offices to merit publication in the CUSTOMS BULLETIN.

MICHAEL T. SCHMITZ,
*Assistant Commissioner,*
*Office of Regulations and Rulings.*

## 19 CFR PART 177

REVOCATION OF RULING LETTERS AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF AN INK JET COLOR PREPARATION

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of revocation of ruling letters and treatment relating to tariff classification of an ink jet color preparation.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, as amended, (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking three ruling letters pertaining to the tariff classification of an ink jet color preparation under the Harmonized Tariff Schedule of the United States ("HTSUS"). Similarly, Customs is revoking any treatment previously accorded by Customs to substantially identical products. Notice of the proposed revocation was published on January 2, 2003, in the CUSTOMS BULLETIN. Several comments were received and are addressed in the attached HQ 966063.

EFFECTIVE DATE: This revocation is effective for merchandise entered or withdrawn from warehouse for consumption on or after August 11, 2003.

FOR FURTHER INFORMATION CONTACT: Deborah Stern, General Classification Branch (202) 572–8785.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **informed compliance and shared responsibility.** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(1)), notice was published on January 2, 2003 in the CUSTOMS BULLETIN, Volume 37, Number 1, proposing to revoke HQ 962365 and HQ 962918, dated April 28, 2000, and HQ 964191, dated May 24, 2000, which classified an ink jet color preparation in heading 3215, HTSUS, as printing ink. Several comments were received in response to the notice and are addressed in the attached HQ 966063.

As stated in the proposed notice, this revocation will cover any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing databases for rulings in addition to the three identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should have advised Customs during the comment period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or to the importer's or Customs' previous interpretation of the Harmonized Tariff Schedule of the United States.

Any person involved in substantially identical transactions should have advised Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final notice of the proposed action.

In HQ 962365 and HQ 962918, dated April 28, 2000, and HQ 964191, dated May 24, 2000, Customs directed three ports to reclassify "Pro-Jet Fast Yellow 2 RO Feed," a color preparation for ink jet printing as printing ink of heading 3215, HTSUS, based on a determination that ink jet printing ink did not require a traditional ink binder. In the proposed notice and ruling letter, Customs stated that the product in its condition as imported was not classifiable as a printing ink because it requires a degree of post-importation processing which exceeds the simple dilution or dispersion described in the Harmonized Commodity Description and Coding System Explanatory Notes (ENs) to that heading before it is ready for use.

In addition, the instant product required the same post-importation processing before it is passed to consumers as "Pro-Jet Fast Cyan 2 Stage" and "Pro-Jet Cyan 1 Press Paste," substantially similar products Customs classified as color preparations of heading 3204, HTSUS, in HQ 965614 and HQ 965615, dated September 30, 2002, respectively. Customs stated it would be incongruous to maintain the instant product's classification in heading 3215, HTSUS, while substantially similar products requiring the same post-importation processing are classified in heading 3204, HTSUS, as color preparations.

Based on further research in conjunction with the comments received in response to the proposed notice, Customs believes that while still relevant, our focus on post-importation processing was somewhat over-emphasized. Several more factors were considered, such as advertising, product information and information gathered from technical sources, including the leading reference book on printing ink, from which Customs derives the position that the instant merchandise is used in making ink jet ink, but is not a printing ink.

As such, the instant product is classifiable in subheading 3204.14.30, HTSUS, which provides for "Synthetic organic coloring matter, whether or not chemically defined; preparations as specified in note 3 to this chapter based on synthetic organic coloring matter; synthetic organic products of a kind used as fluorescent brightening agents or as luminophores, whether or not chemically defined: synthetic organic coloring matter and preparations based thereon as specified in note 3 to this chapter: direct dyes and preparations based thereon: other."

Pursuant to 19 U.S.C. 1625(c)(1), Customs is revoking HQ 962365, HQ 962918, HQ 964191 and any other ruling not specifically identified, to reflect the proper classification of the subject merchandise or substantially similar merchandise, pursuant to the analysis set forth in the attached ruling HQ 966063. This ruling also effectively clarifies the LAW AND ANALYSIS of HQ 965614 and HQ 965615. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by Customs to substantially identical products. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN

Dated: June 4, 2003

John Elkins for MYLES B. HARMON,
*Director,*
*Commercial Rulings Division.*

[Attachment]

[Attachment]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
CLA–2: RR:CR:GC 966063 DBS
Category: Classification
Tariff No.: 3204.14.30

ALEXANDER H. SCHAEFER
CROWELL & MORING LLP
*1001 Pennsylvania Ave., NW*
*Washington, DC 20005*

Re: Printing ink; Pro-Jet™ Fast Yellow 2 RO Feed color preparation; HQ 962365, HQ 962918 and HQ 964191 revoked.

DEAR MR. SCHAEFER:

On April 28, 2000, this office issued HQ 962365, our decision on the Application for Further Review of Protest # 1101–98–100179, which reclassified a color preparation for ink jet printers as a printing ink under heading 3215, Harmonized Tariff Schedule of the United States (HTSUS). We recently issued HQ 965614 (copy enclosed) and HQ 965615, dated September 30, 2002, to you on behalf of your client, Avecia Inc. ("Avecia"), who filed Protest # 1101–98–100179 on products substantially similar to the product at issue in the protest. Those products were determined to be classifiable not as printing inks, but as color preparations of heading 3204, HTSUS. In light of this outcome, we have reconsidered HQ 962365 and determined the classification to be incorrect.

HQ 962918, dated April 28, 2000, answering the Application for Further Review of Protest # 1401–98–100063, and HQ 964191, dated May 24, 2000, answering the Application for Further Review of Protest # 1001–99–102017, addressed the identical product, imported at different ports. Copies of this letter will be forwarded to all three ports.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice

of the proposed revocation of the above identified ruling was published on January 2, 2003, in the Customs Bulletin, Volume 37, Number 1. Three comments opposing the proposal were received in response to the notice. The essence of the arguments and Customs response are included in the LAW AND ANALYSIS portion of this ruling. The proposed ruling was published as HQ 966036. That ruling number is incorrect. The correct ruling number is HQ 966063, as reflected above.

FACTS:

The imported product, "Pro-Jet™ Fast Yellow 2 RO Feed" ("Fast Yellow 2"), consists of an anionic water-soluble dye and certain additives in an aqueous medium made up of water and organic solvent. It is used in ink jet printing. Ink jet ink is distinguishable from traditional ink by its purity. It cannot contain extraneous material that may clog the fine printhead nozzles of an ink jet printer. The instant mixture contains no binder.

Avecia's website advertises the Pro-Jet™ line of products, including "Fast Yellow 2 liquid" (the imported product in its marketable form), as colorants. The "Manufacturing & Quality" section of the site states that most of Avecia's ink jet colorants "come in ready-to-use, aqueous liquid form, for ink preparation." "Fast Yellow 2 liquid" is advertised as being in "ready-to-use" form.

The "Technologies" section states that Avecia has been developing novel colorants and other ink components for aqueous ink jet inks for applications in commercial print, graphic arts and wide format, packaging and labels. Much of Avecia's technology is proprietary. Not only are their colorants proprietary, including the instant patented product (Patent # 5,374,301, issued December 20, 1994, entitled "Inks Suitable for Use in Ink Jet Printing"), but also additive technology for dye technology, dispersents and dispersion technology for pigments, and resins, polymers and *additives for formulation [of ink].*

In the proposed version of this ruling, it was stated that this product did not have a binder because "after the dye mixture penetrates ink jet media (plain paper or special media), elements present in the mixture cause it to "lock" into plain paper or bond to special media by interacting with the chemical qualities of that substrate." Additional research, which will be discussed further in the LAW AND ANALYSIS section of this ruling, has shown that while this product may bind to media without "traditional binders," binders serve several important functions in ink jet ink, and are part of the common formulation of ink jet ink.

A sample of "Fast Yellow 2" was provided to the Customs laboratory in conjunction with two forms (liquid and paste) of the product at issue in HQ 965615. Lab analysis showed that the sample of "Fast Yellow 2" was substantially similar to those in the aforementioned prospective rulings issued by this office. However, the other products were imported in a concentrated paste form, while counsel for Avecia stated that "Fast Yellow 2" is in liquid form and is not concentrated. It is unknown if the sample was in its condition as imported, or in its condition as sold to the end user.

ISSUE:

Whether "Fast Yellow 2" is a preparation based on a dye of heading 3204, HTSUS, or a printing ink of heading 3215, HTSUS.

LAW AND ANALYSIS:

In the proposed version of this ruling, the LAW AND ANALYSIS section of HQ 965614 was incorporated by reference. In light of additional research in order to address the comments received in response to the proposed ruling, the LAW AND ANALYSIS of HQ 965614, and thus of the final HQ 966063, must be expanded. However, the analysis leads to the same conclusion reached in HQ 965614 and the proposed HQ 966063. Thus, the HOLDING remains the same.

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that articles are to be classified by the terms of the headings and relative Section and Chapter Notes. For an article to be classified in a particular heading, the heading must describe the article, and not be excluded therefrom by any legal note. In the event that goods cannot be classified solely on the

basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes (ENs) may be utilized. ENs, though not dispositive or legally binding, provide commentary on the scope of each heading of the HTSUS, and are the official interpretation of the Harmonized System at the international level. Customs believes the ENs should always be consulted. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUS provisions under consideration are as follows:

| | |
|---|---|
| **3204** | Synthetic organic coloring matter, whether or not chemically defined; preparations as specified in note 3 to this chapter based on synthetic organic coloring matter; synthetic organic products of a kind used as fluorescent brightening agents or as luminophores, whether or not chemically defined: |
| | Synthetic organic coloring matter and preparations based thereon as specified in note 3 to this chapter: |
| 3204.14 | Direct dyes and preparations based thereon: |
| 3204.14.30 | Other |
| * | * * * * * * |
| **3215** | Printing ink, writing or drawing ink and other inks, whether or not concentrated or solid: |
| | Printing ink: |
| 3215.19.00 | Other |

Note 3 to chapter 32, HTSUS, provides, in pertinent part, that "[h]eadin[g] 32.04 * * * appl[ies] also to preparations based on colouring matter * * * of a kind * * * used as ingredients in the manufacture of colouring preparations. The headings do not apply, however * * * to other preparations of heading 32.07, 32.08, 32.09, 32.10, 32.12, 32.13 or 32.15. The EN for subheadings 3204.11 to 3204.19 states that the synthetic organic coloring matter and preparations based thereon are subdivided on the basis of application or use. The EN describes direct dyes, in pertinent part, as, "water-soluble anionic dyes which, in aqueous solution in the presence of electrolytes, are substantive to cellulosic fibres * * * used for dyeing * * * paper."

The instant product is described by its importer as a water-soluble anionic dye in an aqueous solution that is substantive to cellulosic fibers used for dying paper and other media used in ink jet printing. Avecia calls its line of ink jet products, including "Fast Yellow 2," colorants or chromophores. A colorant is a recognized, common term used in the ink industry as well as by the courts (see below) as a component of printing ink. *See* The Printing Ink Manual, Fifth Edition, 684 (1993); Hue P. Le, "Progress and Trends in Ink-jet Printing Technology," *Journal of Imaging Science and Technology*, Vol. 42, No. 1 (Jan/Feb 1998); Martin C. Jürgens, "Preservation of Ink Jet Hardcopies," Capstone Project, Cross-Disciplinary Studies, Rochester Institute of Technology (August 27, 1999); Peter Gregory, "Ink jet printing: joining the jet set," Proceedings RMS, Vol. 36/3, (September 2001). Colorant is an ingredient used in the manufacture of ink jet ink, a coloring preparation (printing ink). That the product which matches the description in the ENs for direct dyes may contain additives simply means that it is a preparation based on a direct dye. Thus, the product clearly fits the terms of Note 3 to chapter 32, HTSUS. According to GRI 1, it is classifiable as a preparation of heading 3204, HTSUS.

With respect to printing ink of heading 3215, HTSUS, there are no relevant section or chapter notes. However, the Court of International Trade concluded that inks contain colorants, binders and solvents. *See BASF Wyandotte Corp. v. United States*, 11 C.I.T. 652, 674 F. Supp. 1477 (CIT 1987), *aff'd* 855 F.2d 852 (CAFC 1988), *citing Corporation Sublistatica, SA v. United States*, 511 F. Supp. 805, 809 (CIT 1981) (hereinafter *Sublistatica*). Additionally, the ENs describe printing ink as follows:

> (A) Printing inks (or colours) are pastes of varying consistency, obtained by mixing a finely divided black or coloured pigment with a vehicle. The pigment is usually carbon black for black inks and may be organic or inorganic for coloured inks. The vehicle consists of either natural resins or synthetic polymers, dispersed in oils or dissolved in solvents, and contains a small quantity of additives to impart desired functional properties.
>
> * * * * * * *
>
> These products are generally in the form of liquids or pastes, but they are also included in this heading when concentrated or solid (i.e., powders, tablets, sticks, etc.) to be used as inks after simple dilution or dispersion.

It is a maxim of customs law that tariff provisions were written for the future. *See, e.g., Borneo Sumatra Trading Co., Inc. v. United States*, 311 F. Supp. 326, 338–39 (Cust. Ct. 1970). All of the comments received in response to the proposed revocation raised this point, urging that often-advancing ink jet products should be encompassed in heading 3215, HTSUS. Additionally, in the initial Application for Further Review, the importer argued that because of this maxim, the three-component standard of *Sublistatica* should not be strictly applied. We agree with the latter argument but to a different end. Ink jet technology is specific to ink jet printing and did not exist at the time of *Sublistatica*. For a product to be ink jet ink, it requires certain other components.

In HQ 962365, the holding turned on whether, under *Sublistatica*, a product lacking a binder could be classifiable as a printing ink of heading 3215, HTSUS. We held that it was classifiable as ink because the product could bind to the media without binder. However, the highly-regarded *Printing Ink Manual*, which added a chapter to its fifth edition[1] dedicated to ink jet inks, states that while ink jet ink may have many formulations, it may be simply described as consisting of a solvent blend, colorant, binder and additives. *Id.* at 684. Binders not only serve to bind the colorant and provide adhesion to the surface, but binders control viscosity, promote droplet formation, and are responsible for other properties in the application of the ink. *See id.* at 686.

Other sources vary on the inclusion of binder as a component of ink jet ink. In one publication, a table illustrating water-based ink-jet ink composition lists deonized water, water soluble solvent, dye or pigment, surfactant, biocide, buffer and other additives. *See* Le, *supra*. Another source states that ink jet inks must fulfill a long list of contradictory requirements but can generally be defined as a mixture of a colorant in a vehicle, either water- or solvent-based. *See* Jürgens, *supra*. However, that source also lists binder as a typical ingredient of ink jet ink. While acknowledging that a polymer binder may form a film which can clog the printheads, Jürgens states that it can be avoided with a careful choice of solvent. *See id.*

Jürgens explains that polymer binders may also serve as mordants. Mordants anchor the colorant to the substrate, making water soluble dyes waterfast. Mordants other than polymer binders include chemical compounds that have an affinity for both the dye and the substrate, or added amine groups to make the dye cationic (i.e., positively charged ions will move towards a negatively charged electrode). *See id; for definition of "cationic," see generally* Merriam-Webster's Collegiate Dictionary, Tenth Edition (2001).

In Avecia's submissions addressing why the product does not need binder, only the matter of dye binding to media was discussed. Avecia's description of how additives in the product serve to bind it to media is the same manner in which Jürgens explains mordants. As described above, binder serves many important functions in ink jet ink, only one of which is binding ink to media. In addition, one of the additives which Avecia states aids in binding (the specific details of which are confidential) is a salt. However, according to *The Printing Ink Manual*, the most important and essential additive to ink jet inks is the salt because it provides the electrical conductivity for

[1] The Printing Ink Manual, Fifth Edition, was published in 1993 and reprinted in 1999. The Printing Ink Manual is an international source that has been in print for over thirty years. It is regarded as the authority on printing ink technology, manufacturing, etc.

charging the droplet of ink. While it may aid in binding, as Avecia states, it is not the common purpose of salt in ink jet ink. And, as we have stated, colorant alone can bind to media, but that does not make it an ink.

Finally, Avecia's own Peter Gregory states that a typical ink jet ink is composed of water soluble dye, water, humectant, surfactant and penetrant. *See* Gregory, *supra.* He explains that the best ink jet colorants are anionic water-soluble dyes because they have good color fastness, reliablity, safety and high thermal stability, all terms Avecia uses in its website to describe the instant product. According to Gregory, the first types of ink jet dyes had brilliant color but poor light fastness, a problem Avecia has worked to correct with azo dyes and copper phthalocyanine dyes, which have superior light fastness. *See id.*

Again, the terminology Avecia uses to advertise these products (color fastness, light fastness, etc.) are associated with colorants. Colorants are an ingredient of ink, and while a colorant will bind to media (as all dyes will to some degree or another), colorant is not an ink for purposes of tariff classification. Moreover, "Fast Yellow 2" liquid product is not covered in the description of printing inks in the ENs for heading 3215, HTSUS. Nor is it dedicated to a specific use within the realm of ink jet printing.

In HQ 965916, dated August 24, 1995, we noted that, among other reasons, a product called Irgalite®, which is imported in bulk powder form, was not classifiable as a printing ink of heading 3215, HTSUS, because it was not dedicated to a specific use with a specific substrate, but may require the addition of any number of solvents, additives, or other components. Thus, we stated, it constituted something other than "simple dilution." EN 32.15. While not addressing the EN to heading 3215, HTSUS, directly, we have similarly held other color preparations that were used in various ink applications to be classifiable in heading 3204, HTSUS, and not in heading 3215, HTSUS,. *See* HQ 953655, dated March 3, 1995; HQ 956158, dated July 27, 1995; HQ 956976, dated March 7, 1995. Similarly, in HQ 965614 and HQ 965615, we stated "Pro-Jet™ Fast Cyan 2 Stage" ("Cyan 2") and "Pro-Jet™ Fast Cyan 1 Press Paste," in their respective conditions as imported required more post-importation processing than "simple dilution or dispersion." EN 32.15. We also applied this to "Fast Yellow 2," which raises several points that must be addressed.

One commentor argued that "Fast Yellow 2" need not be dedicated to a particular type of ink jet printing, but simply ink jet printing as a whole. We disagree. There are two categories of ink jet printing, continuous ink jet (CIJ) and drop on demand (DOD). Within each category there are various types of ink jet applications, each requiring different functions. The range of applications for CIJ are complex and diverse, resulting in a vast array of inks formulations. *See The Printing Ink Manual*, 689. The physical and chemical properties required of a CIJ ink are highly demanding. *See id.* at 679. Thus, the additives, which impart specific functional properties, are vital to the ink formulation, though they may only comprise a very small percentage of the ink. *See id* at 687. By including " * * * and contains a small quantity of additives to impart desired functional properties" in the description, the ENs to heading 3215, HTSUS, support this.

As with CIJ, there are several DOD applications. Each DOD process requires a different formulation of ink jet ink, such as piezo and bubble jet inks, which are generally used in office printing applications, valve jet inks used in industrial applications, and hot melt inks, which are solid at room temperature and generally consist of colorant and a polymer blend vehicle. Whereas in *Tomoegawa USA, Inc. v. United States*, 681 F. Supp. 867, 874 (CIT 1988), *aff'd in part and vacated in part*, 861 F.2d 1275 (CAFC 1988), where the court held that although the imported toner was more than a dye or color because it was "of a particular kind and is prepared for the particular process of electrophotography," the instant product is not limited to a particular process of ink jet printing. This product may be specifically designed for use in ink jet applications, but there are several ink jet processes, each having different requirements.

We stated in HQ 965614 that "[w]ithout specific information on the exact additives and processing done post-importation, we must conclude that "Cyan 2" falls short of being printing ink for tariff purposes." This holds true here. Given the vast array of

ink jet ink formulations, and without knowing the specific applications, we cannot conclude that this product is something other than a preparation of heading 3204, HTSUS. Thus, the argument that the product need only be dedicated to ink jet printing fails. For the above-mentioned reasons, the argument from several commentors that the product falls squarely within heading 3215, HTSUS, an *eo nomine* provision, as it satisfies the requirements for printing ink enumerated in *Corporation Sublistatica, SA v. United States*, 511 F. Supp. 805, 809 (1981) likewise fails.

We agree with the commentors that our focus on post-importation processing was somewhat over-emphasized. Upon further examination of the issue, we now believe the relevance of post-importation processing is properly explained above. In addition, we applied the post-importation processing to language in the proposed ruling that we now believe does not apply to this product, as one commentor argued. Accordingly, this final revocation ruling effectively clarifies the LAW AND ANALYSIS sections of HQ 965614 and HQ 965615.

The commentor also requested that Customs clarify what comprises "simple dilution and dispersion." Responding first to the clarification, this language applies only to ink in concentrated (be it liquid or paste) and solid forms. Dilution and dispersion are both terms of art in the ink and chemical industries. Thus, simple dilution or simple dispersion would presumably be the most basic forms of dilution or dispersion of a concentrated or solid ink preparation.

Second, we initially thought that "Fast Yellow 2" was a concentrated form, just as the two Cyan products are. It was the opinion of the Customs laboratory that analyzed the sample of the Fast Yellow 2 that the liquid, which was a slurry, was concentrated. At the same time, the lab analyzed two samples, one liquid and one paste, of Cyan 1-based products, which are concentrated (though only the paste was the subject of HQ 965615). The Customs scientist concluded that all three samples were concentrated. However, counsel for Avecia confirmed in a telephone call that the instant product was not in concentrated form. Therefore, the commentor is correct that the "simple dilution and dispersion" language is not a factor in the legal analysis of this product.

In addition to the foregoing reasons and Avecia's own advertising, we find that Avecia's patent further supports our conclusion that "Fast Yellow 2" is not a printing ink. Although the title suggests otherwise, the descriptions in the patent refer to formulations to which the product will be added. Accordingly, this product is not classifiable according to GRI 1 as a printing ink of heading 3215, HTSUS.

In light of the foregoing reasons, it is not classifiable according to GRI 2(a), which provides in part for incomplete or unfinished goods to be classified as the good itself if it imparts the essential character of the complete good. The legal note to chapter 32, HTSUS, is specific and inclusive of all preparations, that is, all mixtures, that satisfy the note. This product is a colorant, a preparation based on a direct dye, an ingredient used to make a preparation of 3215, HTSUS. It is fully described in heading 3204, HTSUS, and thus GRI 2(a) is not reached. It would be counterintuitive to classify an ingredient used to make a preparation of 3215, HTSUS (specifically provided for in the legal note), as a preparation of heading 3215, HTSUS. Moreover, without having the specific properties of a particular ink jet process, we cannot determine what the essential character of the complete ink jet product would be. Accordingly, HQ 962365, HQ 962918 and HQ 964191 are incorrect.

Under *San Francisco Newspaper Printing Co. v. United States*, 9 CIT 517, 620 F. Supp. 738 (1985), the liquidation of the entries covering the merchandise which was the subject of Protests 1001–99–102017, 1401–98–100063 and 1101–98–100179 was final on both the protestant and the Customs Service. Accordingly, this decision will not impact the classification of the merchandise which was covered by the entries subject to HQ 962365, HQ 962918 and HQ 964191.

With respect to the issue of post-importation processing, this ruling effectively clarifies HQ 965614 and HQ 965615, *supra* p. 8. We have also issued a ruling letter to correct a typographical error which appeared in the proposed ruling and in HQ 965614 and HQ 965615. *See* HQ 966277, dated April 15, 2003. The error was brought to our attention during the comment period. Both in the heading of the rulings and in the

HOLDING, we listed the tariff number as 3204.14.00, HTSUS, a nonexistent provision. This has been corrected to read 3204.14.30, HTSUS, which is the provision described in the HOLDING. This final revocation ruling reflects the correct number.

HOLDING:

"Pro-Jet Fast Yellow 2 RO Feed" is classified in subheading 3204.14.30, HTSUS, which provides for, "Synthetic organic coloring matter, whether or not chemically defined; preparations as specified in note 3 to this chapter based on synthetic organic coloring matter; synthetic organic products of a kind used as fluorescent brightening agents or as luminophores, whether or not chemically defined: synthetic organic coloring matter and preparations based thereon as specified in note 3 to this chapter: direct dyes and preparations based thereon: other."

EFFECT ON OTHER RULINGS:

HQ 962365 and HQ 962918, dated April 28, 2000, and HQ 964191, dated May 24, 2000, are hereby REVOKED. In accordance with 19 U.S.C 1625(c), this ruling will become effective 60 days after its publication in the Customs Bulletin.

John Elkins for MYLES B. HARMON,
*Director,*
*Commercial Rulings Division.*

## 19 CFR PART 177

MODIFICATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF HAND PAPER PUNCHES

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of modification of ruling letter and revocation of treatment relating to tariff classification of certain hand paper punches.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling letter pertaining to the tariff classification of certain hand paper punches under the Harmonized Tariff Schedule of the United States ("HTSUS"), and is revoking any treatment previously accorded by Customs to substantially identical transactions. Notice of the proposed actions was published in the Customs Bulletin on April 30, 2003. No comments were received in response to the notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after August 11, 2003.

FOR FURTHER INFORMATION CONTACT: Gerry O'Brien, General Classification Branch, (202) 572–8780.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "informed compliance" and "shared responsibility." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(1)), a notice was published in the *Customs Bulletin* on April 30, 2003, proposing to revoke NY I87964, dated November 5, 2002, which involved the classification of certain hand paper punches. No comments were received in response to the notice.

As stated in the proposed notice, this modification will cover any rulings on the subject merchandise which may exist but which have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should have advised Customs during the comment period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule. Any person involved in substantially identical transactions should have advised Customs during the comment period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of

the importer or its agents for importations of merchandise subsequent to the effective date of the final notice of this proposed action.

Pursuant to 19 U.S.C. 1625(c)(1), Customs is modifying NY I87964 and any other ruling not specifically identified in order to reflect the proper classification of the hand paper punches pursuant to the analysis set forth in HQ 966189, attached. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by the Customs Service to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the *Customs Bulletin.*

DATED: June 6, 2003

John Elkins for MYLES B. HARMON,
*Director,*
*Commercial Rulings Division.*

[Attachment]

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[Attachment]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
CLA–2 RR:CR:GC 966189 HEF
CATEGORY: Classification
TARIFF NO.: 8203.40.60

June 6, 2003

MS. JESSICA T. DEPINTO
HODES, KEATING & PILON
*39 South LaSalle Street, Suite 1020*
*Chicago, Illinois 60603–1731*

Re: Modification of **NY I87964**; hand paper punches

DEAR MS. DEPINTO:

This is in response to your letter dated January 23, 2003, requesting reconsideration of New York Ruling Letter (NY) I87964, which was issued to your client, Fiskars Consumer Products, Inc., on November 5, 2002, classifying certain hand paper punches in subheading 8203.40.30, Harmonized Tariff Schedule of the United States (HTSUS), as perforating punches and similar handtools with cutting part containing by weight over 0.2 percent of chromium, molbydenum, or tungsten or over 0.1 percent of vanadium. This reconsideration only concerns the hand punches classified in NY I87964 and not the mini palm punches and the photo corner punches also classified therein. In preparing this ruling, consideration was given to an additional submission made on February 20, 2003. We have reconsidered the classification of the merchandise at issue and have determined that NY I87964, in part, is incorrect.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of NY I87964, as described below, was published in the *Customs Bulletin* on April 30, 2003. No comments were received in response to the notice.

FACTS:

The subject merchandise are perforating punches to be used primarily in paper and card crafting, but they may also be used in metal and leather crafting. The punches are one-hole devices with cutting parts of high carbon steel. The punches come in numerous die cast shapes including bears, flowers, hearts and moons. The samples submitted are a 1/4 inch flower shape punch and a 1/4 inch heart shaped punch.

Chromium, molybdenum, tungsten and vanadium are used as hardening agents in the steel punches in small quantities. Chemical analyses of five samples of the subject merchandise show that the content by weight of chromium, molybdenum and tungsten is under 0.2 percent. The content by weight of vanadium is under 0.1 percent.

ISSUE:

Whether the subject hand punches are classifiable as perforating punches with cutting parts containing by weight over 0.2 percent of chromium, molybdenum, or tungsten or over 0.1 percent of vanadium under subheading 8203.40.30, HTSUS, or as other perforating punches classified under subheading 8203.40.60, HTSUS.

LAW AND ANALYSIS:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that articles are to be classified by the terms of the headings and relative Section and Chapter Notes. For an article to be classified in a particular heading, the heading must describe the article, and not be excluded therefrom by any legal note. In the event that goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes (ENs) may be utilized. ENs, though not dispositive or legally binding, provide commentary on the scope of each heading of the HTSUS, and are the official interpretation of the Harmonized System at the international level. Customs believes the ENs should always be consulted. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUS provisions under consideration are as follows:

| | |
|---|---|
| **8203** | Files, rasps, pliers (including cutting pliers), pincers, tweezers, metal cutting shears, pipe cutters, bolt cutters, perforating punches and similar handtools, and base metal parts thereof: |
| 8203.40 | Pipe cutters, bolt cutters, perforating punches and similar tools, and parts thereof: |
| 8203.40.30 | With cutting part containing by weight over 0.2 percent of chromium, molybdenum, or tungsten or over 0.1 percent of vanadium. |
| * * * * * * * | |
| 8203.40.60 | Other (including parts). |

Chemical analyses performed on the cutting parts of the subject punches demonstrate that chromium, molybdenum and tungsten are present in very small quantities which do not amount to 0.2 percent by weight. The results also show that the content of vanadium is well under 0.1 percent by weight. Therefore, the original classification of the subject merchandise in subheading 8203.40.30, HTSUS, is incorrect.

Due to the chemical composition of their cutting parts, the subject punches are classified in subheading 8203.40.60, HTSUS, which provides for files, rasps, pliers (including cutting pliers), pincers, tweezers, metal cutting shears, pipe cutters, bolt cutters, perforating punches and similar handtools, and base metal parts thereof: pipe cutters, bolt cutters, perforating punches and similar tools, and parts thereof: other (including parts).

HOLDING:

The subject merchandise is classifiable in subheading 8203.40.60, HTSUS, which provides for files, rasps, pliers (including cutting pliers), pincers, tweezers, metal cutting shears, pipe cutters, bolt cutters, perforating punches and similar handtools, and

base metal parts thereof: pipe cutters, bolt cutters, perforating punches and similar tools, and parts thereof: other (including parts).

EFFECT ON OTHER RULINGS:

NY I87964, dated November 5, 2002, is hereby modified. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the *Customs Bulletin*.

John Elkins for MYLES B. HARMON,
*Director,*
*Commercial Rulings Division.*

## PROPOSED MODIFICATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF CERTAIN GLASS ARTICLES WITH WIRE BAIL AND TRIGGER, RUBBER RING CLOSURE SYSTEMS

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of proposed modification of a ruling letter and revocation of treatment relating to the tariff classification of certain glass articles with wire bail and trigger, rubber ring closure systems under the Harmonized Tariff Schedule of the United States ("HTSUS").

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625 (c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify one ruling and to revoke any treatment previously accorded by Customs to substantially identical transactions, concerning the tariff classification of certain glass articles with wire bail and trigger, rubber ring closure systems. Comments are invited on the correctness of the intended action.

DATE: Comments must be received on or before July 11, 2003.

ADDRESS: Written comments are to be addressed to the U.S. Customs and Border Protection, Office of Regulations & Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, NW, Mint Annex, Washington, D.C. 20229. Submitted comments may be inspected at U.S. Customs and Border Protection, 799 9th Street, NW, Washington, D.C., during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Andrew M. Langreich, General Classification Branch: (202) 572–8776.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts, which emerge from the law, are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C.§ 1625 (c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to modify Headquarters Ruling Letter (HQ) 965200, dated July 10, 2002. HQ 965200 is set forth as "Attachment A" to this document.

Although in this notice Customs is specifically referring to one ruling, HQ 965200, this notice covers any rulings on similar merchandise that may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing databases; no further rulings have been found. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, other than the referenced rulings (see above), should advise Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS or other relevant statutes. Any person involved in substantially identical transactions should advise Customs during this notice period. An

importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or his agents for importations of merchandise subsequent to this notice.

Customs, pursuant to 19 U.S.C. 1625(c)(1), intends to modify HQ 965200 only as it pertains to the classification of certain glass articles with wire bail and trigger, rubber ring closure systems, and any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis set forth in proposed HQ 966256 (*see* "Attachment B" to this document). In HQ 965200, Customs concluded that the glass articles with wire bail and trigger, rubber ring closure systems were, pursuant to *Myers v. United States*, 969 F. Supp. 66, 71–73 (CIT 1997), classifiable under heading 7010, HTSUS, which provides for, among other things, preserving jars of glass (which *Myers* determined is, as it pertains to preserving jars, an *eo nomine* provision). Based upon the appearance, size and capacity of the articles at issue, Customs has reconsidered its conclusions regarding these articles, and classifies the articles under heading 7013, HTSUS, as set forth in Attachment B.

Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. Before taking this action, consideration will be given to any written comments timely received.

Dated: June 2, 2003

John Elkins for MYLES B. HARMON,
*Director,*
*Commercial Rulings Division.*

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
CLA–2 RR:CR:GC 965200 AML
CATEGORY: Classification
TARIFF Nos.: 7010.90.50; 7013.39.50; 7013.39.60; 7013.99.50; 9405.50.40

PORT DIRECTOR
U.S. CUSTOMS SERVICE
*1500 Port Blvd.*
*Miami, FL 33132*

RE: Protest 5201–00–100573; glass articles

DEAR PORT DIRECTOR:

This is in response to protest 5201–00–100573 (the apparent "lead" protest), which pertains to the tariff classification of certain articles of glass under the Harmonized Tariff Schedule of the United States (HTSUS); this ruling also addresses protests

5201–00–100574 and 5201–00–100792, which concern entries of similar articles and were suspended pending the determination of protest 5201–00–100573; this ruling also addresses protest 5201–00–100369, filed by a surety for the importer and also suspended pending determination of the lead protest. Pictorial representations and catalogue descriptions of the goods were submitted for our examination. Consideration was given to the presentation of counsel for the protestant in a telephone conference with representatives of this office on May 31, 2002, as well as a supplemental submission received on June 11, 2002.

FACTS:

Five entries, filed June 3, 25 and 29, July 19 and September 15, 1999, are included in the lead protest, which is against the classification of the various styles of glassware entered in the protested entries. The glassware is described in the following table (in order by entry and as the items appear in the invoice for each entry, unless otherwise noted; the following designations/abbreviations apply: La Mediterranea = LM; Vetreria Etrusca = VE; Shandong Gaomi = SG; H = height; W = width):

| Factory/# | Protestant's # | Description |
|---|---|---|
| LM 5023 | 605023 | Puchades Jar, 1000 ml capacity<br>3″ opening with 1″ lip<br>W 5.87″ H 5.52″<br>cork closure |
| LM 5024 | 605024 | Puchades Jar, 500 ml capacity<br>2.5″ opening with 1″ lip<br>W 4.61″ H 4.53″<br>cork closure |
| LM 5025 | 605025 | Puchades Jar, 250 ml capacity<br>2″ opening with 1.75″ lip<br>W 3.66″ H 3.66″<br>cork closure |
| LM 5028 | 605028 | Mielera Jar, 1000 ml capacity<br>2″ opening with 1.75″ lip<br>W 5.12″ H 4.93″<br>cork closure |
| LM 5029 | 605029 | Mielera Jar, 500 ml capacity<br>2.25″ opening with 1″ lip<br>W 4.33″ H 4.49″<br>cork closure |
| LM 5030 | 605030 | Mielera Jar, 250 ml capacity<br>2″ opening with 1.75″ lip<br>W 3.74″ H 3.98″<br>cork closure |
| LM 5077 | 605077 | Cuadrado Big Square<br>3.37″ opening with .25″ lip<br>W 3.37″ H 4.73″ |
| LM 5079 | 605079 | Cuadrado Small Square<br>3.37″ opening with .25″ lip<br>W 3.37″ H 3.15″ |
| LM 9046 | 609046 | Redonodo Small Flower Pot<br>2.51″ opening with .25″ lip<br>W 2.51″ H 2.56″ |
| LM 9131 | 609131 | Ecologic flower<br>4.48″ opening with .25″ lip<br>W 4.48″ H 4.48″ |
| LM 9135 | 609135 | Ecologic mini flower<br>2.31″ opening with .25″ lip<br>W 2.31″ H 3.15″ |

| Factory/# | Protestant's # | Description |
|---|---|---|
| LM 9154 | 609154 | Margarita small flower<br>1.5″ opening with 3.5″ lip<br>W "taper" H 2.5″ |
| VE 02991177 | 100610 | Vaso Leonardo, 106 ml capacity<br>1.6″ opening with .32″ lip<br>W 2.64″ H 2.52″ |
| VE 02991178 | 100611 | Vaso Leonardo, 212 ml capacity<br>2″ opening with .32″ lip<br>W 3.36″ H 3.04″ |
| VE 02991178 | 100612 | Vaso Leonardo, 314 ml capacity<br>2.2″ opening with .32″ lip<br>W 3.68″ H 3.28″ |
| VE 03001180 | 100613 | Vaso Leonardo, 370 ml capacity<br>2.48″ opening with .32″ lip<br>W 3.80″ H 3.40″ |
| VE 02001363 | 100650 | Vaso Quadro Firenze, 212 ml capacity<br>1.8″ opening with .32″ lip<br>W 2.84″ H 3.20″ |
| VE 02001564 | 100520 | Quadrotta, 500 ml capacity<br>.8″ opening with .32″ lip<br>W 2.92″ H 7.12″<br>cork closure |
| VE 02001660 | 100532 | Giotto, 500 ml capacity<br>.68″ opening with .32″ lip<br>W 2.88″ H 14″<br>cork closure |
| VE 02001669 | 100530 | Giotto, 100 ml capacity<br>.36″ opening with .32″ lip<br>W 1.8″ H 9″<br>cork closure |
| VE 02002094 | 100531 | Giotto, 200 ml capacity<br>.44″ opening with .32″ lip<br>W 2.16″ H 10.80″<br>cork closure |
| VE 02002903 | 100202 | Cuore Collo Stretto, 100 ml capacity<br>.48″ opening with .25″ lip<br>W 3.04″ H 5.04″<br>cork closure |
| VE 02003795 | 100550 | Rafaello Quadra, 200 ml capacity<br>.44″ opening with .32″ lip<br>W 2.00″ H 10.80″<br>cork closure |
| VE 02001733 | 100080 | Mezzo Onda Piu, 250 ml capacity<br>.80″ opening with .32″ lip<br>W 2.72″ H 7.76″<br>cork closure |
| VE 02001126 | 100090 | Mezzo Onda Meno, 250 ml capacity<br>.80″ opening with .32″ lip<br>W 2.72″ H 7.76″<br>cork closure |
| VE 02001219 | 100430 | Vaso Giotto, 380 ml capacity<br>2.48″ opening with .32″ lip<br>W 4.00″ H 3.96″ |

| Factory/# | Protestant's # | Description |
|---|---|---|
| VE 02001498 | 100080 | Strauss, 200 ml capacity<br>.76″ opening with .32″ lip<br>W 3.24″ H 4.24″<br>cork closure |
| VE 02003570 | 100380 | Lipari, 100 ml capacity<br>.40″ opening with .32″ lip<br>W 1.80″ H 10.80″<br>cork closure |
| VE 02002090 | 100370 | Salina, 100 ml capacity<br>.40″ opening with .32″ lip<br>W 1.92″ H 10.80″<br>cork closure |
| VE 02002045 | 100170 | Luna, 200 ml capacity<br>.68″ opening with .32″ lip<br>W 2.72″ H 7.76″<br>cork closure |
| VE 02001686 | 100270 | Pesce Squalo, 750 ml capacity<br>.80″ opening with .32″ lip<br>W 3.80″ H 14.32″<br>cork closure |
| VE 03000739 | 100040 | Goccia, 100 ml capacity<br>.28″ opening with .32″ lip<br>W 2.32″ H 7.08″<br>cork closure |
| VE 02001481 | 100340 | Beethoven, 500 ml capacity<br>.80″ opening with .32″ lip<br>W 3.72″ H 12.72″<br>cork closure |
| VE 02001441 | 100350 | Rossini, 500 ml capacity<br>.68″ opening with .32″ lip<br>W 3.60″ H 12.72″<br>cork closure |
| VE 02003769 | 100290 | Cammello, 200 ml capacity<br>.68″ opening with .32″ lip<br>W 4.40″ H 8.64″<br>cork closure |
| VE 02000913 | 100100 | Cuadra Onda, 250 ml capacity<br>.68″ opening with .32″ lip<br>W 2.32″ H 6.12″<br>cork closure |
| VE 02003716 | 100450 | Vaso Le Carre, 200 ml capacity<br>3.48″ opening with bail and trigger closure<br>W 3.48″ H 2.48″ |
| VE 02002797 | 100460 | Vaso Le Carre, 350 ml capacity<br>3.48″ opening with bail and trigger closure<br>W 3.48″ H 3.76″ |
| VE 02001847 | 100060 | Palline, 100 ml capacity<br>.32″ opening with .28″ lip<br>W 2.32″ H 7.08″<br>cork closure |
| VE 02001717 | 100275 | Pesce Luna, 750 ml capacity<br>.76″ opening with .36″ lip<br>W 6.16″ H 9.32″<br>cork closure |

| Factory/# | Protestant's # | Description |
|---|---|---|
| VE 02001562 | 100510 | Quadrotta, 100 ml capacity<br>.56″ opening with .32″ lip<br>W 1.96″ H 3.88″<br>cork closure |
| VE 02001563 | 100515 | Quadrotta, 250 ml capacity<br>.56″ opening with .32″ lip<br>W 2.48″ H 5.36″<br>cork closure |
| VE 02001978 | 100525 | Michelangelo, 100 ml capacity<br>.48″ opening with .2″ lip<br>W 2.00″ H 9″<br>cork closure |
| VE 02001978 | 100526 | Michelangelo, 200 ml capacity<br>.48″ opening with .28″ lip<br>W 2.36″ H 10.8″<br>cork closure |
| VE 02001978 | 100527 | Michelangelo, 500 ml capacity<br>.76″ opening with .24″ lip<br>W 2.8″ H 14″<br>cork closure |
| VE 02001976 | 100540 | Raffaelo, 100 ml capacity<br>.48″ opening with .2″ lip<br>W 1.6″ H 9″<br>cork closure |
| VE 02002101 | 100541 | Raffaelo, 200 ml capacity<br>.48″ opening with .28″ lip<br>W 2.00″ H 10.80″<br>cork closure |
| VE 02002142 | 100570 | Vienna, 200 ml capacity<br>.48″ opening with .32″ lip<br>W 2.40″ H 8.88″<br>cork closure |
| VE 02001685 | 100280 | Pesce, 750 ml capacity<br>.76″ opening with .36″ lip<br>W 4.48″ H 13.60″<br>cork closure |
| VE | 100581 | Onda Alta, 200 ml capacity<br>.56″ opening with .32″ lip<br>W 2.00″ H 8.28″<br>cork closure |
| VE | 100400 | Onda Alta, 100 ml capacity<br>.48″ opening with .32″ lip<br>W 1.52″ H 6.76″<br>cork closure |
| VE 03001403 | 100260 | Cavallucio Marino, 200 ml capacity<br>.76″ opening with .24″ lip<br>W 3.72″ H 9.40″<br>cork closure |
| VE 03000628 | 100430 | Vaso Giotto, 380 ml capacity<br>2.48″ opening with .32″ lip<br>W 4.00″ H 3.96″ |
| VE 98000101 | 100470 | Vaso Le Carre, 500 ml capacity<br>3.28″ opening with bail and trigger closure<br>W 3.48″ H 4.92″ |

| Factory/# | Protestant's # | Description |
|---|---|---|
| VE 02001232 | 100600 | Toledo, 100 ml capacity<br>.48" opening with .32" opening<br>W 2.56" H 4.52"<br>cork closure |

On May 15, 2002, a member of my staff confirmed with counsel for the protestant that the articles listed above comprise the articles contained in three of the five protested entries: WYQ–2002–4740, WYQ–2002–6745 and WYQ–2002–3494. From the entry summaries for the remaining entries, we note the remaining styles that are subject of the protest (duplicated styles are not repeated):

| Factory/# | Protestant's # | Description |
|---|---|---|
| SG 933 | | Melon Jar 1.7 liter with cork lid |
| SG 928 | | Melon Jar 3.7 liter with cork lid |
| SG 929 | | Melon Jar 7 liter with glass lid |
| SG 930 | | Melon Jar 16 liter with glass ball top |
| SG 901 | | Orcio Hermetic Jar with hinged glass |
| SG 702LE | | 12" Square pasta with cork lid |
| SG 6701 | | Chairman Jar .85 liter |
| SG 6702 | | Chairman Jar .4 liter with cork lid |
| SG 9801 | | Fruit Basket Shaped Jar |
| SG GS–23 | | Quadra Etung |
| SG 3501–4 | | Square Jar .85 liter with cork lid |

The protestant states that "most of the samples" are used as glass candle holders. The protestant states that the articles are imported empty and following importation will be filled with candle wax or gel and wick. For these reasons, the protestant asserts that the articles are classifiable under heading 9405, HTSUS, which provides for "non-electric lamps and light fittings." Specifically, the protestant contends that articles numbered 605079, 609154, 609046, 605077, 605035, 605030, 609131, 605028, 605029, 605025, 605023, 605024 should be so classified.

The protestant states that other samples should be classified under heading 7010, HTSUS, which provides for glass containers commonly used commercially for the conveyance and packing of goods. Specifically, the protestant contends that articles numbered 100280, 100470, 100570, 100581, 100260, 100400, 100430, 100541, 100526, 100540, 100527, 100525, 100275, 100515 and 100510 should be so classified.

The entries were made on June 3, 25 and 29, July 19 and September 15, 1999, and the entries were liquidated on September 15, 2000. All of the merchandise was classified under subheadings 7013.39 and 7013.99, HTSUS, as table or kitchen glassware or decorative glassware, respectively, depending at the eight-digit level upon value. On December 13, 2000, counsel for the protestant filed this protest, arguing alternatively as described above and below that the merchandise is of a kind used for the conveyance or packing of goods and should be classified in heading 7010, HTSUS, or as non-electric lamps and light fittings (candleholders) under heading 9405, HTSUS.

ISSUE:

Whether the glassware is classifiable as preserving jars of glass or containers of a kind used for the conveyance or packing of goods under heading 7010, HTSUS, or glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes under heading 7013, HTSUS, or as non-electric lamps and light fittings under heading 9405, HTSUS?

LAW AND ANALYSIS:

Initially, we note that the lead protest (5201–00–100573, so too were protests 5201–00–100574 and 5201–00–100792) was timely filed (*i.e.*, within 90 days after but not

before the notice of liquidation; see 19 U.S.C. § 1514(c)(3)(A)) and the matter protested is protestable (see 19 U.S.C. § 1514(a)(2) and (5)).

With regard to protest 5201–00–100369[1], we note that the affected entries were liquidated on September 15, 2000 and the protest bears a filing date of April 9, 2001—206 days after liquidation. Using the September 15, 2000, date as the date of filing of the protest, the protest was untimely filed (*i.e.*, a protest must be filed within 90 days after but not before the notice of liquidation (19 U.S.C. § 1514(c)(3)(A); 19 C.F.R. § 174.12(e)). The notice of liquidation was dated September 15, 2000, and the protest was filed April 9, 2001, 206 days after the notice of liquidation). For an example of the judicial treatment of a protest filed after the 90-day period for filing a protest, see *Penrod Drilling Co. v. United States*, 13 CIT 1005, 727 F. Supp. 1463, rehearing dismissed, 14 CIT 281, 740 F. Supp. 858 (1990), affirmed, 9 Fed. Cir. (T) 60, 925 F. 2d 406 (1991). Protest 5201–00–100369 must be denied.

The classification of merchandise under the HTSUS is governed by the General Rules of Interpretation (GRIs). GRI 1, HTSUS, states, in pertinent part, that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes.

The Harmonized Commodity Description And Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise. Customs believes the ENs should always be consulted. See T.D. 89–80, published in the Federal Register August 23, 1989 (54 FR 35127, 35128).

The HTSUS provisions under consideration are as follows:

| | |
|---|---|
| 7010 | Carboys, bottles, flasks, jars, pots, vials, ampoules and other containers, of glass, of a kind used for the conveyance or packing of goods; preserving jars of glass; stoppers, lids and other closures, of glass: |
| | Other, of a capacity: |
| 7010.90 | Exceeding 0.33 liter but not exceeding 1 liter: |
| 7010.90.20 | Produced by automatic machine. |
| 7010.90.50 | Other containers (with or without their closures). |
| * * * * * * * | |
| 7013 | Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018): |
| | Glassware of a kind used for table (other than drinking glasses) or kitchen purposes other than that of glass-ceramics: |
| 7013.39 | Other: |
| 7013.39.20 | Valued not over $3 each. |
| 7013.39.50 | Valued over $3 but not over $5 each. |
| 7013.39.60 | Valued over $5 each. |
| | Other glassware: |
| 7013.99 | Other: |
| | Other: |
| | Other: |
| 7013.99.50 | Valued over $0.30 but not over $3 each. |
| 7013.99.60 | Valued over $3 but not over $5 each. |
| * * * * * * * | |

[1] The Customs Form ("CF") 19 completed by the surety bears a hand-written protest number 5201–00–100573. Via e-mail dated May 24, 2002, Customs Miami confirmed the protest number to be 5201–00–100369.

| | |
|---|---|
| 9405 | Lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included; illuminated signs, illumi nated nameplates and the like, having a perma nently fixed light source, and parts thereof not elsewhere specified or included: |
| 9405.50 | Non electrical lamps and lighting fittings: |
| | Other: |
| 9405.50.40 | Other. |

An article is to be classified according to its condition as imported. See *XTC Products, Inc. v. United States*, 771 F.Supp. 401, 405 (1991). See also, *United States v. Citroen*, 223 U.S. 407 (1911). The articles at issue are empty glassware of various shapes and sizes. While the use of the articles is considered in the analysis (see below), the sizes, characteristics and appearance of the articles are also considered in determining their classification.

Via facsimile dated June 11, 2002, the protestant presented evidence that all of the articles sourced from Vetreria Etrusca are annealed after shaping during the process of manufacture. We note that "all glass articles must go through an annealing or heat-treatment cycle after forming and cooling as annealing prevents harmful stresses from freezing into the glass." See HQ 960274, dated October 9, 1997. Thus, the annealing process does not influence our classification determinations.

The provision for preserving jars of glass in heading 7010 is an eo nomine provision (*Myers v. United States*, 969 F. Supp. 66, 71–73 (CIT 1997)). The provision in heading 7010 for containers "of a kind used" for the conveyance or packing of goods and the provision in heading 7013 for glassware "of a kind used" for table or kitchen purposes are "principal use" provisions (*Group Italglass U.S.C., Inc. v. United States*, 17 CIT 226 (1993)). As an *eo nomine* provision is more specific than a use provision, we will consider the former first. Next, we will consider merchandise which is properly classifiable under heading 7010 as "of a kind used" as it cannot be classified under heading 7013, because of the specific parenthetical provision to that effect in heading 7013 (*Myers*, 969 F. Supp. at 75).

The provision for preserving jars of glass in heading 7010 was considered in *Myers, supra*. That case concerned jars with wire bail and rubber ring closure systems. The Court found the jars to be classifiable under the provision for "preserving jars of glass" in heading 7010. The Court concluded that:

> The three fundamental feature[s] which distinguish 'preserving' jars from 'packing and conveyance' jars and 'storage' jars are: (1) the thickness of the glass in the walls of the jars; (2) the jar's ability to form and maintain a hermetic seal; and (3) the jar's potential for reuse as a canning or preserving jar. [969 F. Supp. at 74]

In this case, item #s 100450, 100460, 100470, each with a wire bail and trigger, rubber ring closure system, are classifiable in accordance with *Myers, supra*. That is, the articles meet the 3-part test of *Myers* in that the glass walls of the jars are relatively thick, the closure system provides the ability to form and maintain a hermetic seal, and the jars have potential for reuse as canning or preserving jars. Based on *Myers* and the criteria therein, we conclude that these articles are described in the *eo nomine* provision "preserving jars of glass" in heading 7010, HTSUS. Item #s 100450, 100460, 100470, each with a wire bail and trigger, rubber ring closure system, are classified in subheading 7010.90.50, HTSUS. This is consistent with Headquarters Ruling (HQ) 960513 dated August 11, 1997, and HQ 959637 dated December 4, 1997.

EN 70.10 states, in pertinent part that "[t]his heading covers all glass containers of the kind commonly used commercially for the conveyance or packing of liquids or of solid products (powders, granules, etc.). * * * " The key phrase in the quoted material is "commonly used commercially for the conveyance or packing" of liquids or solid products. The root word of "commercially" is commerce, which is described as the exchange or buying and selling of commodities. The *Random House Dictionary of the English Language* (1973), p. 295, and *Webster's New World Dictionary (3rd Coll. Ed.)* (1988), p. 280. The root word of "conveyance" is convey which is described as to carry,

bring or take from one place to another; transport; bear. *Supra*, at p. 320 and p. 305, respectively.

In applying Additional U.S. Rule of Interpretation 1(a), HTSUS, and the relevant cases below to heading 7010, HTSUS, it is Customs position that, as a general rule, a glass article"(tm)s physical form will indicate its principal use and thus to what class or kind it belongs. However, should an exception arise so that an article"(tm)s physical form does not indicate to what class or kind it belongs or its physical form indicates it belongs to more than one class or kind, Customs considers the other enumerated principal use criteria.

With regard to the "Vaso Leonardo", "Vaso Quadro Firenze" and "Quadrotta", (item #s 100610, 100611, 100613, 100650, 100510, 100515 and 100520), the sizes of the openings and necks vary but each article is configured to "hold" a lid or cap with a traditional threaded closure. There is no evidence as to whether the ultimate purchaser's primary expectation would be to discard or recycle the articles after the goods conveyed or packed in them are destroyed, but the relatively ordinary appearance (*e.g.*, compared to the other articles considered in this protest) and nature of the articles supports such a conclusion. There is no evidence whether the environment of sale of the articles features the goods packed in the articles and not the articles themselves, or whether the articles are recognized in the trade as used primarily to pack and convey goods to a consumer who then discards or recycles the articles after this initial use, but the physical form (see above) indicates that this is so. Item #s 100610, 100611, 100613, 100650, 100510, 100515 and 100520 are properly classified in heading 7010, HTSUS, and therefore may not be classified in heading 7013, HTSUS. They are classifiable as containers of glass of a kind used for the conveyance or packing of goods in subheading 7010.90.50, HTSUS. This is consistent with HQ 959639 dated October 21, 1997.

Within heading 7013, subheading 7013.39.20 provides for " * * * [g]lassware of a kind used for table (other than drinking glasses) or kitchen purposes other than that of glass-ceramics: * * * [o]ther: * * * [o]ther: [v]alued not over $3 each"; subheading 7013.39.50 provides for " * * * [g]lassware of a kind used for table (other than drinking glasses) or kitchen purposes other than that of glass-ceramics: * * * [o]ther: * * * [o]ther: * * * [v]alued over $3 each: * * * [other] * * * [v]alued over $3 but not over $5 each"; and subheading 7013.99.60 provides for " * * * [g]lassware of a kind used for table (other than drinking glasses) or kitchen purposes other than that of glass-ceramics: * * * [o]ther: * * * [o]ther: * * * but not [v]alued over $3 each: * * * [other] * * * [v]alued over $5 each".

Headings 7013 and 9405, HTSUS, as applicable to the merchandise under consideration, are controlled by use (other than actual use) (see *Group Italglass U.S.A., Inc. v. United States*, 17 CIT 1177, 839 F. Supp. 866 (1993); *E.M. Chemicals v. United States*, 923 F. Supp. 202 (CIT 1996); *Stewart-Warner Corp. v. United States*, 3 Fed. Cir. (T) 20, 25, 748 F.2d 663 (1984)). If an article is classifiable according to the use of the class or kind of goods to which it belongs, as is true of these provisions, Additional U.S. Rule of Interpretation 1(a), HTSUS, provides that:

> In the absence of special language or context which otherwise requires—(a) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use.

In other words, the article's principal use in the United States at the time of importation determines whether it is classifiable within a particular class or kind (principal use is distinguished from actual use; a tariff classification controlled by the latter is satisfied only if such use is intended at the time of importation, the goods are so used and proof thereof is furnished within 3 years after the date the goods are entered (U.S. Additional Note 1(b); 19 C.F.R. § 10.131—10.139); as stated above, the competing provisions are principal use provisions, not actual use provisions).

This office has exhaustively reviewed the principal use of articles such as those under consideration (glassware in various forms contended to be principally used as

candle holders). In the March 25, 1998, edition of the CUSTOMS BULLETIN, Volume 32, Number 12, page 32, Customs issued a notice under 19 U.S.C. § 1625 proposing to modify or revoke two Headquarters and five New York ruling letters, to classify the articles described therein as other glassware of a kind used for indoor decoration or similar purposes in subheading 7013.99, HTSUS, instead of as candle holders in subheading 9405.50.40, HTSUS. The comments submitted in response to this notice provided considerable information regarding the "pertinent factors" (see above) related to the principal use of the class or kind of goods to which the goods considered in the proposed rulings belong. Based on this information, Customs has concluded that the class or kind for goods such as the "Vaso Leonardo" and similar containers is defined by the form or shape of the article (*e.g.*, bell-shape, similar to bell-shape, flower pot shape, tulip or flower petal shape, cube or rectangle shape, and possibly other shapes) and its size. We have found there to be a clear distinction between glassware used as candle holders and that used for general indoor decoration based on the size of the articles, in the absence of other pertinent evidence or information. Glassware of those forms with an opening of 4 inches or less in diameter and a height or depth of 5 inches or less is used substantially more frequently as a candle holder than for any other purpose, according to the information we have obtained, and larger glassware is used substantially more frequently for general indoor decoration.

The Courts have provided factors, which are indicative but not conclusive, to apply when determining whether merchandise falls within a particular class or kind. They include: general physical characteristics, expectation of the ultimate purchaser, channels of trade, environment of sale (accompanying accessories, manner of advertisement and display), use in the same manner as merchandise which defines the class, economic practicality of so using the import, and recognition in the trade of this use. (See *Kraft, Inc. v. United States*, 16 CIT 483 (1992), *G. Heileman Brewing Co. v. United States*, 14 CIT 614 (1990), and *United States v. Carborundum Company*, 63 CCPA 98, C.A.D. 1172, 536 F.2d 373 (1976), cert. denied, 429 U.S. 979 (1976).)

Note 1(e) to Chapter 70, HTSUS, provides that the Chapter does not cover "lamps or light fittings * * * * or parts thereof of heading 9405[.]" Thus, if it is determined that the essential character of the articles is that of a candleholder, the articles cannot be classified under heading 7013, HTSUS.

The EN to heading 9405, HTSUS, states that lamps and light fittings of this group can be composed of any material and use any source of light, including candles. In addition, EN 9405 states that this heading covers "in particular: (6) [c]andelabra, candlesticks, and candle brackets[.]"

We have previously considered the definitions of the terms used in the heading and EN. In Headquarters Ruling Letter (HQ) 957412, dated August 1, 1995, we stated that:

> [T]hese rulings (HQ 954308 dated June 6, 1994, HQ 955935 dated May 16, 1994, HQ 953016 dated April 27, 1993, HQ 088742 dated April 22, 1991, and HQ 089054 dated August 2, 1991) held that the terms "candlestick", "candlestick holder", and "candle holder" are interchangeable. Candle holder has been defined as a candlestick, *Webster's II New Riverside University Dictionary*, pg. 224 (1st ed. 1984), and as a holder for a candle; candlestick, *The Random House Dictionary of the English Language*, pg. 216 (1st Ed. 1983). Candlestick has been defined as a utensil for supporting a candle, whether elaborately made or in the common form of a saucer with a socket in the center, *Webster's New International Dictionary*, pg. 390 (2d ed. 1939). Reference to lexicographic authorities is proper when determining the meaning of a tariff term. *Hasbro Industries, Inc. v. U.S.*, 703 F. Supp. 941 (CIT 1988), aff'd, 879 F.2d 838 (1989); *C.J. Tower & Sons of Buffalo, Inc. v. U.S.*, 69 CCPA 128, 673 F.2d 1268 (1982).

Based on the above authorities, Customs issued Treasury Decision (T.D.) 96–7 which, among other things, adopted certain criteria as indicative, but not conclusive, of whether a particular glass article qualifies as part of the class "containers of glass of a kind used for the conveyance or packing of goods" in heading 7010, HTSUS, or the

class "glassware of a kind used for table or kitchen purposes; glass storage articles" in heading 7013, HTSUS.

The criteria in T.D. 96–7 for containers of glass of a kind used for the conveyance or packing of goods in heading 7010, HTSUS, are:

1. [The container] generally [has] a large opening, a short neck (if any) and as a rule, a lip or flange to hold the lid or cap, [is] made of ordinary glass (colourless or coloured) and [is] manufactured by machines which automatically feed molten glass into moulds where the finished articles are formed by the action of compressed air;
2. [T]he ultimate purchaser's primary expectation is to discard/recycle the container after the conveyed or packed goods are used;
3. [The container is] sold from the importer to a wholesaler/distributor who then packs the container with goods;
4. [The container is] sold in an environment of sale that features the goods packed in the container and not the jar itself;
5. [The container is] used to commercially convey foodstuffs, beverages, oils, meat extracts, etc.;
6. [The container is] capable of being used in the hot packing process; and
7. [The container is] recognized in the trade as used primarily to pack and convey goods to a consumer who then discards the container after this initial use.

Applicability of the foregoing criteria to the merchandise is as follows. Each of the articles appears to have been manufactured by automatic machine from ordinary glass. The articles are imported by the protestant and in turn are sold to wholesalers/distributors who packs them with foodstuffs, beverages, oils, etc., for commercial conveyance and sale. There is no evidence whether the articles are capable of being used in the hot packing process.

Item #s 605077, 605079, 609135, and 609046 meet the criteria delineated above regarding the differentiation of glass articles for conveyance or decoration versus candleholders. They are either in the form of flower pots or squares and are of the dimensions commonly associated with candleholders. Thus item #s 605077, 605079, 609135, and 609046 will be classified under heading 9405, HTSUS.

Application of the criteria in T.D. 96–7, supra, to the remaining articles indicates that they are not of the class or kind principally used for the conveyance or packing of goods. The sizes of the openings and necks vary but the articles are not configured to "hold" a lid or cap, other than having a rim with which a cork or similar closure may be used. There is no evidence as to whether the ultimate purchaser's primary expectation would be to discard or recycle the articles after the goods conveyed or packed in them are used or exhausted. However, the attractive, unique and unusual forms of the articles (the "Puchades" and "Mielera" Jars (item #s 605023, 605024, 605025, 605028, 605029 and 605030), Giotto bottles (item #s 100532,100530,100531), Cuore Collo Stretto (item # 100202), Rafaello Quadra (item # 100550), Mezza Onda Piu (item # 1000080), Meza Onda Meno5(item # 100090), Vaso Giotto (item # 100430), Strauss (item # 10561), Lipari (item # 100380), Salina (item # 100370), Luna (item # 100170), Pesce Squalo (item # 100270), Goccia (item # 100040), Beethoven (item # 100340), Rossini (item # 10035), Cammello (item # 100290), Quadra Onda (item # 100100), Palline (item# 100060), Pesce Luna (item # 100275), Michelangelo (item #s 100525, 100526, 100527), Raffaelo (item #s 100540 and 100541), Vienna (item # 100570), Pesce (item # 100280), Onda Alta (item #s 100581,100400), Cavallucio Marino (item # 100260), and Toledo (item # 100600)) supports the conclusion that the articles would be retained for decorative or storage purposes. Their varied sizes and capacities support the same conclusion for each of those articles, as does the fact that the top closures for all of these articles are cork or similar closures allowing for repetitive, extremely easy opening and closing. In the case of the cylindrically shaped articles (Quadrotta, (item # 100520), Quadrotta (item #s 100510 and 100515)), although the articles are somewhat similar to wine bottles (see HQ 961409 dated October 22, 1998), they have unusually long necks and an attractive, unusual form, supporting the same conclusion. Similarly, although there is no evidence whether the environment of sale of the articles features the goods packed in the articles and not the articles themselves, or whether the articles are recognized in the trade as used primarily to pack

and convey goods to a consumer who then discards or recycles the articles after this initial use, the foregoing factors support the conclusion that the articles are emphasized in the environment of sale and that the articles are retained after use for decorative or storage purposes. These articles are classified as other glassware of a kind used for table (other than drinking glasses) or kitchen purposes under subheadings 7013.39.20, 7013.39.50, or 7013.39.60, HTSUS, depending on value. This is consistent with HQ 959637 dated December 4, 1997, and HQ 961353 dated October 20,1998.

No description or illustration was provided for some of the articles: item #s VE 85000242 (TO 48 Oro Rosso 48mm), 85000156 (TO 53 Oro RTS 53mm), 85000171 (TO 58 Oro RTS 58mm), 85000139 (TO 63 Oro RTS 63mm), 85000121(TO 70 ABA RTS 70mm), item #s VE 85000125 (TS Granada/et cal), 85000056 (Tappo Sugh A 24 × 14), 85000095 (TS Quadrotta 100/250), 85000055 (Tappo Sug B 26 × 16); SG 933, Melon Jar 1.7 liter with cork lid; SG 928 Melon Jar 3.7 liter with cork lid, SG 929 Melon Jar 7 liter with glass lid; SG 930 Melon Jar 16 liter with glass ball top; SG 901 Orcio Hermetic Jar with hinged glass; SG 702LE 12" Square pasta with cork lid; SG 6701 Chairman Jar .85 liter; SG 6702 Chairman Jar .4 liter with cork lid; SG 9801 Fruit Basket Shaped Jar; SG GS–23 Quadra Etung; SG 3501–4 Square Jar .85 liter with cork lid; SG 933. The law governing protests requires a protest to set forth "distinctly and specifically * * * each category of merchandise * * * [,] * * * the nature of each objection and the reasons therefor * * * and * * * any other matter required by the [of the Treasury] by regulation" (19 U.S.C. § 1514(c)(1)(B) through (D)). The Customs Regulations issued under this law require "[a] specific description of the merchandise * * * " and that "[t]he nature of, and justification for the objection [be] set forth distinctly and specifically with respect to each category, payment, claim, decision, or refusal" (19 C.F.R. § 174.13(a)(5) and (6)). In the absence of a description or illustration of these articles, the protest must be denied in regard to them and they are classified as liquidated, as other glassware of a kind used for table (other than drinking glasses) or kitchen purposes in subheading 7013.39.20, 7013.39.50, or7013.39.60, HTSUS, or7013.99.50, HTSUS, as other decorative glass articles, depending on value.

We are not persuaded by the protestant's reliance upon the holding in *Will & Baumer Candle Co., Inc. v. United States*, 21 Cust. Ct. 149 (1st Div. 1948). In that case, the Court considered whether 3 horizontal lines on a religious candle constituted decoration or ornamentation. The articles at issue (including those deemed to be classifiable as candleholders) are readily distinguishable from the articles considered by the Court in *Will & Baumer*, they consist of decorative bottles and kitchen ware, as well as glass for the conveyance of goods.

HOLDINGS:

(1) Item #s 100450, 100460, 100470, each with a wire bail and trigger, rubber ring closure system, are classified as preserving jars of glass, other containers (with or without their closures), under subheading 7010.90.50, HTSUS.

(2) Item #s 100610, 10061 1, 100613, 100650, 100510, 100515 and 100520 are classified as containers of glass of a kind used for the conveyance or packing of goods, other containers (with or without their closures), under subheading 7010.90.50, HTSUS.

(3) Item #s 605077, 605079, 609135, and 609046 will be classified as candleholders under subheading 9405.50.40, HTSUS, as non-electric lamps and lighting fittings, other, other.

(4) The remaining articles are classified as other glassware of a kind used for table (other than drinking glasses) or kitchen purposes under subheading 7013.39.20, 7013.39.50, 7013.39.60, or 7013.99.50, HTSUS, depending on value.

The protest should be **GRANTED IN PART** (as to Item #s 100450, 100460,100470, 100610,100611,100613, 100650,100510, 100515 and 100520, 605077, 605079, 609135, and 609046), and **DENIED IN PART** (as to the remaining articles). Protest 5201–00–100369 must be **DENIED** (see above).

In accordance with Section 3A(11)(b) of Customs Directive 099 3550–065, dated August 4, 1993, Subject: Revised Protest Directive, you are to mail this decision, together with the Customs Form 19, to the protestant no later than sixty (60) days from the

date of this letter. Any reliquidation of the entry or entries in accordance with the decision must be accomplished prior to mailing the decision.

Sixty (60) days from the date of the decision, the Office of Regulations and Rulings will make the decision available to Customs personnel, and to the public on the Customs Home Page or, the World Wide Web at www.customs.treas.gov, by means of the Freedom of Information Act, and other methods of public distribution.

John Elkins for MYLES B. HARMON,
*Acting Director,*
*Commercial Rulings Division.*

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
CLA–2 RR:CR:GC 966256 AML
CATEGORY: Classification
TARIFF NO.: 7010.90.50

MR. PETER A. QUINTER
BECKER & POLIAKOFF, P.A.
*P. O. Box 9057*
*Ft. Lauderdale, FL 33310*

Re: Modification of HQ 965200, classification of glass jar with wire bail and trigger, rubber ring closure system

DEAR MR. QUINTER:

This is in regard to HQ 965200, a decision on the Application for Further Review of Protest # 5201–00–100573 (initiated by you on behalf of GlasPak Industries, Inc.), issued on July 10, 2002. HQ 965200 concerned, in pertinent part, the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of certain empty glass jars with wire bail and trigger, rubber ring closure systems. We have reconsidered the classification of such articles. This letter sets forth the correct classification.

FACTS:

In HQ 965200, we described the articles at issue as follows:

| | | |
|---|---|---|
| VE 02003716 | 100450 | Vaso Le Carre, 200 ml capacity<br>3.48″ opening with bail and trigger closure<br>W 3.48″ H 2.48″ |
| VE 02002797 | 100460 | Vaso Le Carre, 350 ml capacity<br>3.48″ opening with bail and trigger closure<br>W 3.48″ H 3.76″ |
| VE 98000101 | 100470 | Vaso Le Carre, 500 ml capacity<br>3.28″ opening with bail and trigger closure<br>W 3.48″ H 4.92″ |

We framed and discussed the classification of these articles as follows:

The provision for preserving jars of glass in heading 7010 is an *eo nomine* provision (*Myers v. United States*, 969 F. Supp. 66, 71–73 (CIT 1997)). The provision in heading 7010 for containers "of a kind used" for the conveyance or packing of goods and the provision in heading 7013 for glassware "of a kind used" for table or kitchen purposes are "principal use" provisions (*Group Italglass U.S.C., Inc. v. United States*, 17 CIT 226 (1993)). As an *eo nomine* provision is more specific than a use provision, we will consider the former first. Next, we will consider merchandise which is properly classifiable under heading 7010 as "of a kind used" as it

cannot be classified under heading 7013, because of the specific parenthetical provision to that effect in heading 7013 (*Myers*, 969 F. Supp. at 75).

The provision for preserving jars of glass in heading 7010 was considered in *Myers, supra*. That case concerned jars with wire bail and rubber ring closure systems. The Court found the jars to be classifiable under the provision for "preserving jars of glass" in heading 7010. The Court concluded that:

> The three fundamental feature[s] which distinguish 'preserving' jars from 'packing and conveyance' jars and 'storage' jars are: (1) the thickness of the glass in the walls of the jars; (2) the jar's ability to form and maintain a hermetic seal; and (3) the jar's potential for reuse as a canning or preserving jar. [969 F. Supp. at 74]

> In this case, item #s 100450, 100460, 100470, each with a wire bail and trigger, rubber ring closure system, are classifiable in accordance with *Myers, supra*. That is, the articles meet the 3-part test of *Myers* in that the glass walls of the jars are relatively thick, the closure system provides the ability to form and maintain a hermetic seal, and the jars have potential for reuse as canning or preserving jars. Based on *Myers* and the criteria therein, we conclude that these articles are described in the *eo nomine* provision "preserving jars of glass" in heading 7010, HTSUS. Item #s 100450, 100460, 100470, each with a wire bail and trigger, rubber ring closure system, are classified in subheading 7010.90.50, HTSUS.

As stated above, we have reconsidered this analysis and the conclusions therefrom derived. The proper analysis and conclusion follows.

ISSUE:

Whether the empty glass jars with wire bail and trigger, rubber ring closure systems are classifiable *eo nomine* as preserving jars of glass under heading 7010, HTSUS, or glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes under heading 7013, HTSUS?

LAW and ANALYSIS:

Classification of merchandise under the HTSUS is made in accordance with the General Rules of Interpretation (GRIs), taken in order. GRI 1 provides that classification is determined according to the terms of the headings and any relative section or chapter notes.

The HTSUS headings and subheadings under consideration are as follows:

| | | |
|---|---|---|
| 7010 | | Carboys, bottles, flasks, jars, pots, vials, ampoules and other containers, of glass, of a kind used for the conveyance or packing of goods; preserving jars of glass; stoppers, lids and other closures, of glass: |
| | | Other, of a capacity: |
| 7010.90 | | Other: |
| 7010.90.50 | | Other containers (with or without their closures). |
| * | * | * * * * * * * |
| 7013 | | Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018): |
| | | Glassware of a kind used for table (other than drinking glasses) or kitchen purposes other than that of glass-ceramics: |
| 7013.39 | | Other: |
| 7013.39.20 | | Valued not over $3 each. |

The Harmonized Commodity Description And Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise. Customs believes the ENs should always be consulted. See T.D. 89–90, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

An article is to be classified according to its condition as imported. See *XTC Products, Inc. v. United States*, 771 F.Supp. 401, 405 (1991). See also, *United States v. Citroen*, 223 U.S. 407 (1911). The article at issue is an empty jar of relatively small size and capacity. While the use of the article is considered in the analysis (see below), the size, characteristics and appearance of the article are also considered in determining its classification.

The provision for preserving jars of glass in heading 7010 is an *eo nomine* provision (*Myers v. United States*, 969 F. Supp. 66, 71–73 (CIT 1997)). The provision in heading 7010 for containers "of a kind used" for the conveyance or packing of goods and the provision in heading 7013 for glassware "of a kind used" for table or kitchen purposes are "principal use" provisions (*Group Italglass U.S.C., Inc. v. United States*, 17 CIT 226 (1993)). As the CIT determined that the *eo nomine* provision includes canning and preserving jars, *i.e.*, those designed to produce a hermetic seal, we consider that alternative first. If the merchandise is classifiable under heading 7010, it cannot be classified under heading 7013, because of the specific parenthetical provision to that effect in heading 7013 (*Myers*, 969 F. Supp. at 75).

The provision for preserving jars of glass in heading 7010 was considered in *Myers, supra*. That case concerned jars with wire bail and rubber ring closure systems. The Court found the jars to be classifiable under the provision for "preserving jars of glass" in heading 7010. The Court concluded that:

> The three fundamental feature[s] which distinguish 'preserving' jars from 'packing and conveyance' jars and 'storage' jars are: (1) the thickness of the glass in the walls of the jars; (2) the jar's ability to form and maintain a hermetic seal; and (3) the jar's potential for reuse as a canning or preserving jar. [969 F. Supp. at 74]

In reaching its conclusion, the Court observed that "storage jars are not designed in such a manner that a hermetic seal, which prevents air from entering the head space of the jar, can be formed between the jar and the lid." *Id.* at 71.

In Headquarters Ruling Letter ("HQ") 961205, dated March 12, 1999, we recited the following rules vis-à-vis *eo nomine* provisions:

> "An *eo nomine* designation is one which describes a commodity by a specific name, usually one well known to commerce." 2 R. Sturm, *Customs Law and Administration* § 53.2 (3rd Edition 1990).
>
> The common meaning of an *eo nomine* designation is determined by the meaning it had at the time of enactment of the tariff act. *United States v. Brager-Larsen*, 36 C.C.P.A. 1, 3–4, C.A.D. 388 (1948); *Davies Turner & Co. v. United States*, 45 C.C.P.A. 39, C.A.D. 669 (1957). In their determination of what this "common meaning" encompasses, Customs and the courts may examine the use to which the imported goods are put. *United States v. Quon Quon Co.*, 46 C.C.P.A. 70, 73, C.A.D. 699 (1959).
>
> Thus, it is proper to take use into account when classifying an article under an *eo nomine* provision where the common and commercial meaning of the article at the time the tariff schedule was drafted included references to use. Headquarters Ruling Letter (HQ) 950783, dated September 10, 1992, citing *Admiral Div. of Magic Chef, Inc. v. United States*, 754 F. Supp. 881, (Ct. Int'l Trade 1990) (it is necessary to examine legislative history and other extrinsic sources to determine the common meaning of merchandise); *Hummel Chemical Co. v. United States*, 29 C.C.P.A. 178, 183, C.A.D. 189 (1941) (tariff terms generally "are not drafted in terms of science, but in the language of commerce, which is presumptively that in common use.").

The articles at issue are significantly smaller in size and capacity than those at issue in *Myers*. We are cognizant of the fact that strict application of the criteria established by *Myers* (comparative thickness of the glass, the ability to form and maintain a hermetic seal and the jar's potential for reuse as a canning or preserving jar) would appear to require that the articles in question be classified under heading 7010, HTSUS. However, we conclude that, based on the size, capacity and appearance of the articles in question, as well as the meaning of *eo nomine* designations as discussed

above, the articles in question would neither commonly nor commercially be referred to as canning or preserving jars; thus falling without the purview of those identifying criteria adopted concerning similar articles considered in *Myers, supra*. We believe this to be especially telling given that the articles at issue in *Myers* were capable of holding one and one and a half liters, respectively, of liquid or preserves. It is therefore reasonable to conclude that the articles at issue, capable of holding a mere fraction of the articles in *Myers*, are not classifiable as preserving jars under heading 7010, HTSUS. Accordingly, the articles are classified under heading 7013, HTSUS.

This determination is consistent with Headquarters Ruling (HQ) 960513 dated August 11, 1997, and HQ 959637 dated December 4, 1997. In HQ 960513, a two liter capacity jar with a bail and trigger closure system was classified under heading 7010, HTSUS. Similarly, in HQ 959637, a 750 ml capacity jar with a bail and trigger closure system was classified under heading 7010, HTSUS, and a small decorative bottle with a 50 ml capacity and wire bail and trigger, rubber ring closure system was classified under heading 7013, HTSUS.

HOLDING:

The glass articles at issue, model numbers VE 02003716/100450 ( Vaso Le Carre, 200 ml capacity); VE 02002797/100460 (Vaso Le Carre, 350 ml capacity); and VE 8000101/ 100470 (Vaso Le Carre, 500 ml capacity) are classifiable as glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018): glassware of a kind used for table (other than drinking glasses) or kitchen purposes other than that of glass-ceramics: other: under subheading 7013.90, HTSUS, with the eight digit designation to be determined by the value of the articles.

Although there is no consequence of this action with regards to protest 5201–00–100573, future imports occurring on or after this ruling's effective date should be classified consistently with this ruling.

EFFECT ON OTHER RULINGS:

HQ 965200 is modified as it pertains to glass articles with wire bail and trigger, rubber ring closure systems.

John Elkins for MYLES B. HARMON,
*Director,*
*Commercial Rulings Division.*

## 19 CFR PART 177

REVOCATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF BATTERY PACKS FOR MOBILE CELLULAR TELEPHONES

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of revocation of ruling letter and revocation of treatment relating to tariff classification of battery packs for mobile cellular telephones.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling letter pertaining to the

tariff classification of battery packs for mobile cellular telephones under the Harmonized Tariff Schedule of the United States ("HTSUS"), and is revoking any treatment previously accorded by Customs to substantially identical transactions. Notice of the proposed actions was published in the *Customs Bulletin* on April 16, 2003. Two comments were received in response to the notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after August 11, 2003.

FOR FURTHER INFORMATION CONTACT: Gerry O'Brien, General Classification Branch, (202) 572–8780.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "informed compliance" and "shared responsibility." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(1)), a notice was published in the *Customs Bulletin* on April 16, 2003, proposing to revoke HQ 965130, which involved the classification of battery packs for mobile cellular telephones. Two comments were received in response to the notice.

As stated in the proposed notice, this revocation will cover any rulings on the subject merchandise which may exist but which have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise sub-

ject to this notice should have advised Customs during the comment period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule. Any person involved in substantially identical transactions should have advised Customs during the comment period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final notice of this proposed action.

Pursuant to 19 U.S.C. 1625(c)(1), Customs is modifying HQ 965130 and any other ruling not specifically identified in order to reflect the proper classification of the frog tool pursuant to the analysis set forth in HQ 966268, attached. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by the Customs Service to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the Customs Bulletin.

DATED: May 21, 2003

John Elkins for MYLES B. HARMON,
*Director,*
*Commercial Rulings Division.*

[Attachment]

[Attachment]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
CLA–2 RR:CR:GC 966268 GOB
CATEGORY: Classification
TARIFF NO.: 8507.80.80

May 21, 2003

GAIL T. CUMINS, ESQ.
SHARRETTS, PALEY, CARTER & BLAUVELT, P.C.
*67 Broad Street*
*New York, NY 10004*

Re: Revocation of HQ 965130; Battery Packs for Mobile Cellular Telephones

DEAR MS. CUMINS:

This letter pertains to HQ 965130 dated March 27, 2002, issued with respect to Protest 2502–02–100012. You filed that protest on behalf of Sanyo Energy (USA) Corporation. We have reviewed the classification in HQ 965130 and have determined that it is incorrect. This ruling sets forth the correct classification. This ruling has no effect on the entries which were the subject of Protest 2502–02–100012.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of HQ 965130, as described below, was published in the *Customs Bulletin* on April 16, 2003. Two comments were received in response to the notice. They are addressed in the LAW AND ANALYSIS section of this ruling.

FACTS:

In HQ 965130, the battery packs were described as follows:

> The articles at issue are battery packs (model #s F41000729 (Nokia), F41000712 (Nokia), and F41000934 (Qualcomm) that are specifically designed for use with mobile cellular telephones
> * * * * * * * *
>
> The battery packs, while manufactured to be used solely with specific brands and models of mobile cellular telephone[s], have the following similar components: one or more rechargeable storage batteries, a protective device that can shut off the battery pack when it reaches extreme temperatures (either heat or cold), a printed circuit board assembly ("PCBA") with functions that vary with the requirements needed and the model of phone, and a plastic housing that provides protection and housing for the components previously mentioned as well as serving as a significant portion of the back/body of the phone.

In HQ 965130, we classified the battery packs in subheading 8529.90.99, HTSUS, as: "Parts suitable for use solely or principally with the apparatus of headings 8525 to 8529: Other: Other: Other."

ISSUE:

Are the subject battery packs for mobile cellular telephones provided for in heading 8507, HTSUS, as electric storage batteries, or in heading 8529, HTSUS, as parts suitable for use solely or principally with the apparatus of headings 8525 to 8529?

LAW AND ANALYSIS:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation ("GRI's"). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI's may then be applied.

The Harmonized Commodity Description and Coding System Explanatory Notes ("EN's") constitute the official interpretation of the Harmonized System at the inter-

national level. While neither legally binding nor dispositive, the EN's provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See T.D. 89–80.

The HTSUS provisions under consideration are as follows:

| | |
|---|---|
| 8507 | Electric storage batteries, including separators therefor, whether or not rectangular (including square); parts thereof: |
| 8507.80 | Other: |
| 8507.80.80 | Other |
| * * * * * * * | |
| 8529 | Parts suitable for use solely or principally with the apparatus of headings 8525 to 8529: |
| 8529.90 | Other: |
| | Other: |
| 8529.90.99 | Other |

Note 2 to Section XVI, HTSUS, provides in pertinent part as follows:

> Subject to note 1 to this section, note 1 to chapter 84 and to note 1 to chapter 85, parts of machines (not being parts of the articles of heading 8484, 8544, 8545, 8546 or 8547) are to be classified according to the following rules:
>
> (a) Parts which are goods included in any of the headings of chapters 84 and 85 (other than headings 8409, 8431, 8448, 8466, 8473, 8485, 8503, 8522, 8529, 8538 and 8548) are in all cases to be classified in their respective headings;
>
> (b) Other parts, if suitable for use solely or principally with a particular kind of machine, or with a number of machines of the same heading (including a machine of heading 8479 or 8543) are to be classified with the machines of that kind or in heading 8409, 8431,8448, 8466, 8473, 8503, 8522, 8529 or 8538 as appropriate
>
> * * *
>
> (c) All other parts are to be classified in heading 8409, 8431, 8448, 8466, 8473, 8503, 8522, 8529 or 8538 as appropriate, or failing that, in heading 8485 or 8548.

Two comments were received in response to the notice. As one of the commenters, your comment included the following points: the rulings cited in the proposal (and in this ruling, below) are clearly distinguishable; the HSC decision described below is in conflict with Note 2(b) to Section XVI, HTSUS, which requires classification in heading 8529, HTSUS; and there is a factual distinction between the battery packs of HQ 965130 and those of the HSC decision. A second commenter claims that the subject battery packs are properly classified in subheading 8529.90.99, HTSUS. The commenter states that it is premature to rely on the HSC action for guidance as to the proper classification.

We are not persuaded by these comments. Please see the analysis below.

In HQ 965130 we referred to a ruling from Revenue Canada (*Nokia Products Ltd. v. Deputy Minister of National Revenue*, Appeal No. AP–99–082 (July 26, 2000)) in which the Canadian International Trade Tribunal classified cellular telephone battery packs in heading 8529 of the Canadian Tariff. This issue, and the Revenue Canada position, were recently considered by the Harmonized System Committee ("HSC"). In HSC 30 in November 2002 (Annex H/26 to Doc. NCO655E2), the Harmonized System Committee, by a vote of 40 to 0 with two abstentions, decided that battery packs for cellular telephones were classified in heading 8507, as opposed to heading 8529, by application of GRI 1. It is our position that decisions of the HSC should be treated in the same manner as the EN's, i.e., while neither legally binding nor dispositive, they provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. T.D. 89–80 provides that EN's and decisions in the *Compendium of Classification Opinions* "should receive consider-

able weight." While this HSC decision may not yet be in the *Compendium of Classification Opinions*, it is a final decision of the HSC.

In HQ 953767 dated April 19, 1993, Customs classified a cellular telephone battery in subheading 8507.30.00, HTSUS.

In NY D83733 dated November 18, 1998, Customs classified a lithium-ion rechargeable battery for a cellular telephone in subheading 8507.80.80, HTSUS.

While we agree with you that these two rulings do not involve the exact same merchandise as that at issue here, we believe that they are very relevant with respect to the scope and applicability of heading 8507, HTSUS.

Subject to certain exceptions that are not relevant here, goods that are identifiable as parts of machines or apparatus of Chapter 84 or Chapter 85 are classifiable in accordance with Note 2 to Section XVI, HTSUS. *See Nidec Corporation v. United States*, 861 F. Supp. 136, *aff'd* 68 F. 3d 1333 (1995). Parts which are goods included in headings of Chapters 84 and 85 are in all cases to be classified in their respective headings. See Note 2(a) to Section XVI, HTSUS. Because we believe that Note 2(a) controls the classification of the subject battery packs, Note 2(b) is not applicable.

With respect to certain of the points raised in your comment, we note the following. Because we are classifying on the basis of Note 2(a) to Section XVI, HTSUS, we do not find that Note 2(b) is in conflict with this ruling, or with the HSC decision described above. Further, we do not believe that there are substantial differences between the goods at issue here and the goods at issue in the HSC decision described above.

We find that the subject goods are essentially electric storage batteries. Therefore, pursuant to Note 2(a) to Section XVI, HTSUS, we determine that the subject battery packs for mobile cellular telephones are provided for in heading 8507, HTSUS, and are classified in subheading 8507.80.80, HTSUS, as: "Electric storage batteries, including separators therefor, whether or not rectangular (including square); parts thereof: Other: Other."

Our determination is consistent with the Harmonized System Committee decision described above. Our analysis of this matter leads us to conclude that the Harmonized System Committee's conclusions are correct.

As indicated above, this ruling has no effect on the entries which were the subject of Protest 2502–02–100012, as Customs no longer has jurisdiction over those entries. See *San Francisco Newspaper Printing Co. v. United States*, 620 F. Supp. 738 (CIT 1985).

HOLDING:

The subject battery packs for mobile cellular telephones are provided for in heading 8507, HTSUS, and are classified in subheading 8507.80.80, HTSUS, as: "Electric storage batteries, including separators therefor, whether or not rectangular (including square); parts thereof: Other: Other."

EFFECT ON OTHER RULINGS:

HQ 965130 is revoked. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the *Customs Bulletin*.

John Elkins for MYLES B. HARMON,
*Director*
*Commercial Rulings Division.*

# United States Court of International Trade

One Federal Plaza
New York, NY 10278

*Chief Judge*

Gregory W. Carman

*Judges*

Jane A. Restani
Thomas J. Aquilino, Jr.
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa A. Ridgway
Richard K. Eaton
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Senior Judges

Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

*Clerk*

Leo M. Gordon

# Decisions of the United States Court of International Trade

(Slip Op. 03–59)

BEFORE: HON. RICHARD W. GOLDBERG, SENIOR JUDGE, CORRPRO COMPANIES, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT.

Court No. 01–00745

[Plaintiff's motion for summary judgment is denied; Defendant's motion to dismiss for lack of jurisdiction is granted in part and denied in part, and Defendant's cross-motion for summary judgment is granted in part and denied in part.]

(Dated: June 4, 2003)

*Simons & Wiskin* (*Jerry P. Wiskin* and *Philip Yale Simons*) for Plaintiff.

*Robert D. McCallum, Jr.*, Assistant Attorney General, United States Department of Justice; *John J. Mahon*, Acting Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Aimee Lee*); *Beth C. Brotman*, Office of Assistant Chief Counsel, International Trade Litigation, United States Customs Service, Of Counsel, for Defendant.

## OPINION

GOLDBERG, *Senior Judge:* This action arises from the Bureau of Customs and Border Protection's ("Customs") denial of Plaintiff's North American Free Trade Agreement ("NAFTA") claim and protest of classification filed on September 6, 2001. Plaintiff Corrpro Companies, Inc. ("Corrpro") moves for summary judgment pursuant to USCIT R. 12(b) or R. 56. Defendant moves to dismiss for lack of jurisdiction and, in the alternative, cross-moves for summary judgment.

The Court has jurisdiction in this case under 28 U.S.C. § 1581(a). For the reasons that follow, Plaintiff's motion for summary judgment is denied. Defendant's motion to dismiss for lack of jurisdiction is granted in part and denied in part, and Defendant's cross-motion for summary judgment is granted in part and denied in part.

## I. BACKGROUND

Plaintiff Corrpro is an importer of magnesium anodes. The subject merchandise was classified by Customs under subheading 8104.19.00 of the Harmonized Tariff Schedule of the United States ("HTSUS"), as "Magnesium and articles thereof, including waste and scrap: Unwrought magnesium: Other" at the rate of 6.5% *ad valorem*. Under this subheading the merchandise was ineligible for NAFTA preferential treatment.

On May 17, 1993, Customs issued Headquarters Ruling Letter ("HRL") 557046 classifying the subject merchandise under subheading 8104.19.00, HTSUS. Under this subheading, the magnesium anodes were ineligible for NAFTA treatment. On August 16, 1999, Corrpro began importing magnesium anodes into the United States under HTSUS 8104.19.00, according to Customs' classification. In the year following the time of entry, Corrpro did not file a claim for NAFTA preferential treatment. On June 30, 2000, Customs liquidated the subject merchandise. On September 12, 2000, Corrpro filed a protest under 19 U.S.C. § 1514(a)(2), asserting that the proper classification of its imported anodes was under HTSUS subheading MX 8543.38.00. Corrpro claims that its protest of September 12, 2000 was a joint protest for NAFTA preferential treatment and protest of classification and duty rates. On August 13, 2001, Customs denied the protest.

Corrpro filed a complaint with the Court of International Trade on September 6, 2001. In its complaint, Corrpro asserted that the Court has jurisdiction under 28 U.S.C. § 1581(a) because its post-entry claim constituted (1) a timely protest of classification, liquidation, and duty rates pursuant to 19 U.S.C. § 1514 and (2) a claim for NAFTA preferential treatment pursuant to 19 U.S.C. § 1520(d) or, in the alternative, 19 U.S.C. § 1520(c).

On October 10, 2001 Customs retracted HRL 557046 and reclassified the subject merchandise under HTSUS 8543.30.00 ("New Classification"). Customs issued its final notice of revocation of HTSUS 8104.19.00 on December 5, 2001. Under the New Classification, the subject merchandise was eligible for NAFTA preferential treatment. Therefore, in response to Corrpro's claim, Customs agreed to stipulate to the classification of the subject merchandise under the New Classification at the applicable general rate of duty. Corrpro refused to agree with Customs' stipulation and proceeded with its complaint.

On June 27, 2002, Corrpro submitted the certificates of origin in connection with its September 6, 2001 claim for NAFTA preferential treatment.

## II. STANDARD OF REVIEW

The threshold issue on appeal is whether the Court has jurisdiction to hear this case. *See Everflora Miami, Inc., v. United States*, 19

CIT 485, 885 F. Supp. 243 (1995). In deciding a USCIT R. 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, the Court looks to whether the moving party challenges the sufficiency of the pleadings or the factual basis underlying the pleadings. In the first instance, the Court must accept as true all facts alleged in the non-moving party's pleadings. In the second instance, the Court accepts as true only those facts which are uncontroverted. All other facts are subject to fact-finding by the Court. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

## III. Discussion

Pursuant to 28 U.S.C. § 1581(a), Corrpro claims the Court has jurisdiction over this action commenced to contest the denial of a protest, in whole or in part, under 19 U.S.C. § 1520(d) or, alternatively, 19 U.S.C. § 1520(c).[1]

Customs concedes that the appropriate classification of the subject merchandise was under HTSUS 8543.30.00. Corrpro claims that its protest of September 12, 2000 was a post-entry NAFTA claim of Customs' final decision regarding "classification, rate, and amount of duties chargeable," under § 1520(d). Alternatively, Corrpro claims that the protest met the requirements of § 1520(c) requesting reliquidation based on Customs' mistake of fact or clerical error in reclassifying the magnesium anodes. Thus, under either § 1520(d) or § 1520(c), Corrpro asserts that the Court has jurisdiction pursuant to 28 U.S.C. § 1581(a).

In its motion for summary judgment, Customs argues that the Court lacks § 1581(a) jurisdiction in this matter because Customs made no final decision in the protest denial. Thus, there was no decision for Corrpro to appeal to the Court. Customs also claims that the Court lacks jurisdiction over Corrpro's claim for NAFTA preferential treatment because Corrpro failed to file a timely claim. If the Court finds jurisdiction over Corrpro's NAFTA claim, Customs cross-moves for summary judgment on the basis of Corrpro's failure to comply with the requirements of a NAFTA claim—namely by failing to file certificates of origin with its protest.

The Court addresses Corrpro's § 1520(d) and § 1520(c) arguments individually.

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[1] 19 U.S.C. § 1514(a) grants an importer 90 days from the date of notice of liquidation to file a protest challenging the classification and assessments of duties. In the absence of such a protest within the specified time period, Customs may reliquidate an entry under 19 U.S.C. § 1520(c) or 19 U.S.C. § 1520(d). Corrpro concedes that it was unable to file a claim within the timing requirements of 19 U.S.C. § 1514 and thus invokes the extensions provided by § 1520(d) or, alternatively, § 1520(c).

A. *The Court lacks jurisdiction over Corrpro's § 1520(d) claim due to Corrpro's failure to comply with the procedural requirements for filing a NAFTA preferential treatment claim.*

We first address the issue of whether the Court has jurisdiction to consider the complaint as a protest for NAFTA preferential treatment filed under 19 U.S.C. § 1520(d).[2]

Corrpro claims that the Court has jurisdiction to hear this case because its complaint was a protest for NAFTA preferential treatment filed pursuant to 19 U.S.C. § 1520(d). Corrpro concedes that it did not make its § 1520(d) petition for NAFTA treatment until after the merchandise was imported, nor did it within one year after the time of entry. Corrpro argues that they were precluded by law from claiming NAFTA preferential treatment until two years after the time of entry when Customs reclassified the subject merchandise. It claims that pursuant to a binding Customs ruling, they were required to enter the subject merchandise under HTSUS 8104.19.00, which was ineligible for NAFTA preferential treatment. Thus, it filed a post-liquidation protest pursuant to § 1520(d).

Customs claims that a § 1520(d) petition must precede a protest where no NAFTA claim was made at the time of the entry of the subject merchandise, citing *Power-One, Inc. v. United States*, 83 F. Supp. 2d 1300, Slip Op. 99–133 (Dec. 14, 1999). Customs argues that *Power-One* stands for the proposition that the Court of International Trade ("CIT") lacks jurisdiction if the NAFTA claim was not protested prior to coming to the CIT. *Id.* at 964–65. In the alternative, Customs argues that assuming arguendo that Corrpro filed a NAFTA preferential treatment claim, Corrpro's claim was invalid since it did not include the certificates of origin, as required by § 1520(d). As a result, according to Customs, the Court does not have jurisdiction to hear this claim.

An importer may file a protest contesting the denial of a NAFTA preferential treatment claim at the date of entry pursuant to 19 U.S.C. § 1514(a). If no such claim was filed at the date of entry, the importer may file one within one year of the date of entry pursuant to 19 U.S.C. § 1520(d).

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[2] Section 1520(d) provides in pertinent part that:

> [n]otwithstanding the fact that a valid protest was not filed, the Customs Service may * * * reliquidate an entry to refund any excess duties * * * paid on a good qualifying under the rules of origin set out in section 202 of the North American Free Trade Agreement Implementation Act for which no claim for preferential tariff treatment was made at the time of importation if the importer, within 1 year after the date of importation, files, in accordance with those regulations, a claim that includes—
>
> (1) a written declaration that the good qualified under those rules at the time of importation
>
> (2) copies of all applicable NAFTA Certificates of Origin * * * and
>
> (3) such other documentation relating to the importation of the goods as the Customs Service may require.

19 U.S.C. § 1520(d).

Customs reiterates these requirements in 19 C.F.R. § 181.23.[3] This section, which outlines the procedures for filing a claim for NAFTA preferential treatment, also requires the petitioning party to submit a copy of each certificate of origin.

Accordingly, a protest that is filed without the required documents is invalid. *See Audiovox Corp v. United States*, 8 CIT 233 (1984) (dismissing plaintiff's claim for duty-free treatment for lack of jurisdiction.). In *Audiovox*, the court determined that the plaintiff's request for duty-free treatment was invalid since the plaintiff failed to file the certificates of origin. Consequently, the court lacked jurisdiction over an invalid protest. "[T]he requirements of 19 U.S.C. § 1514 are conditions precedent for jurisdiction in this court under 28 U.S.C. § 1581(a)." *Id.* at 237. *See also Power-One*, 83 F. Supp. 2d at 965 (holding that the court lacked jurisdiction over plaintiffs' 19 U.S.C. § 1520(d) claim since the plaintiff's failed to file a valid protest against Customs' denial of their § 1520(d) claim). *Power-One* concluded that the plaintiffs' NAFTA claim was invalid, in part because the plaintiffs failed to respond to requests for specific documentation concerning the origin of the exports in their original claim for NAFTA preferential treatment, and therefore, the court lacked jurisdiction. *Id.*

Corrpro agrees that it did not send the certificates of origin with any of its of its § 1520(d) protests. Indeed, Corrpro filed its last § 1520(d) protest on June 6, 2001 but did not send the certificates of origin until June 27, 2002. Corrpro failed to follow the procedural requirements of 19 U.S.C. § 1520(d) and 19 C.F.R. § 181.23. Accordingly, the Court lacks jurisdiction over Corrpro's § 1520(d) claim because the denials of petitions for NAFTA treatment are not protestable. *See Audiovox*, 8 CIT 236. Accordingly, Plaintiff's NAFTA preferential treatment claim is rejected for lack of jurisdiction.

B. *Customs's reclassification of the subject merchandise was the result of a mistake of law, therefore rendering Corrpro's § 1520(c) claim inapplicable.*

19 U.S.C. § 1520(c) allows an importer to protest an administrative decision of Customs if the decision is predicated upon a "clerical error, mistake of fact or other inadvertence" in any entry, liquidation, or other customs transaction.[4] As stipulated, the protest must be

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[3] Section 181.23(b) provides in pertinent part, that

> A. post-importation claim for a refund shall be filed by presentation of the following:
> (1) A written declaration stating that the good qualified as an originating good at the time of importation and setting forth the number and date of the entry covering the good;
> (2) * * * a copy of each Certificate of Origin pertaining to the goods.

19 C.F.R. § 181.23.

[4] Section 1520(c) provides in pertinent part that:

> Notwithstanding a valid protest was not filed, the Customs Service may, in accordance with regulations prescribed by the Secretary, reliquidate an entry or reconciliation to correct—
> (1) a clerical error, mistake of fact, or other inadvertence, whether or not resulting from or contained in electronic transmission, not amounting to an error in the construction of a law, adverse to the im-

made within one year after the date of liquidation. All of Corrpro's protests were filed within one year of the date of liquidation. Therefore, the Court has jurisdiction to hear Corrpro's protest filed under § 1520(c).

Section 1520(c) applies to mistakes of fact and does not apply to mistakes of law. *Sunderland of Scot, Inc. v. United States*, 2001 Ct. Intl. Trade LEXIS 114, Slip Op. 01–112 (Aug. 29, 2001). In *Sunderland*, Customs determined that the subject merchandise, pull-over coats, satisfied a test proving that the coats were waterproof. This determination was contrary to Customs' original determination and warranted reclassification of the merchandise. The *Sunderland* court held that the reclassification of this product constituted an error in the construction of law rather than an error in mistake of fact. The court explained the difference between a mistake of fact and a mistake of law:

> A mistake of fact occurs when a decision is based on a reasonable belief that a fact exists differently than in reality * * * [A] mistake of law occurs when the legal consequences of a given set of facts are incorrectly interpreted or anticipated." *Id.*

Thus, the *Sunderland* court determined that reclassification was a reinterpretation of a given set of facts. This reinterpretation resulted in a newly-determined legal consequence. Therefore, the reclassification was a mistake of law and § 1520(c) was inapplicable.

In the instant case, Customs reclassified the magnesium anodes because they determined that the subject merchandise was not unwrought. This determination was based on the reevaluation of the composition of the subject merchandise rather than any mistake of fact, error, or inadvertence. Therefore, this reclassification, like the reclassification in *Sunderland*, was based on a prior misinterpretation of the contents of the merchandise. The *Sunderland* court determined that this kind of error is an error in the construction of law rather than a mistake of fact. Likewise, we hold here that Customs' reclassification of the subject merchandise was a mistake of law rendering § 1520(c) inapplicable to Plaintiff's case.

Therefore, Plaintiff's motion for summary judgment is denied and Defendant's cross-motion for summary judgment is granted on this issue.

## IV. CONCLUSION

Plaintiff's motion for summary judgment on its appeal of Customs' protest denial is denied (1) for lack of subject matter jurisdiction under 19 U.S.C. § 1520(d) due to Plaintiff's failure to timely file certifi-

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porter and manifest from the record or established by documentary evidence, in any entry, liquidation, or other customs transaction, when the error, mistake, or inadvertence is brought to the attention of the Customs Service within one year after the date of liquidation or exaction * * *

19 U.S.C. § 1520(c).

cates of origin and (2) since the reclassification of the subject merchandise was not a clerical error or mistake of fact as required under 19 U.S.C. § 1520(c). Accordingly, Defendant's motion to dismiss for lack of jurisdiction is granted in part and denied in part, and Defendant's cross-motion for summary judgment is granted in part and denied in part.

(Slip Op. 03–60)

BEFORE: MUSGRAVE, JUDGE, DREXEL CHEMICAL COMPANY, PLAINTIFF *v.* THE UNITED STATES, DEFENDANT.

Court No. 98–02–00295–S

[Plaintiff challenged Customs' determination that certain entries of Diuron Technical and Diuron 80–WP herbicides imported from Malaysia were not entitled to duty-free treatment because they did not qualify as products of a beneficiary developing country under the Generalized System of Preferences, 19 U.S.C. § 2463 (Supp. V 1993 & 1994). Trial was held to determine whether a dual substantial transformation took place in the manufacture of the subject merchandise enabling the value of chemicals imported into Malaysia to be included in considering whether 35 percent of the appraised value of the merchandise was derived from materials produced in Malaysia or processing operations performed in Malaysia. Held: The Court finds that a dual substantial transformation took place in the manufacture of Diuron Technical and Diuron 80–WP; thus the subject entries shall be reliquidated duty-free.]

(Decided: June 5, 2003)

*Adduci, Mastriani & Schaumberg, L.L.P.* (*V. James Adduci, II* and *Maureen F. Brown*) for Plaintiff.

*Robert D. McCallum, Jr.*, Assistant Attorney General; *John J. Mahon*, Acting Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Saul Davis*) for Defendant.

OPINION

This action concerns the proper classification of certain entries of Diuron Technical and Diuron 80–WP herbicides imported from Malaysia between March 1993 and March 1994 by Plaintiff Drexel Chemical Company ("Drexel"). The United States Customs Service, now organized as the Bureau of Customs and Border Protection, ("Customs") classified the entries of Diuron Technical under subheading 2924.21.1500 of the Harmonized Tariff Schedule of the United States ("HTSUS"), which specifies a duty rate of 13.5% *ad valorem*, and Diuron 80–WP under HTSUS subheading 3808.30.1000 which specifies a duty rate of $0.18/kg plus 9.7%. Drexel asserts that the Diuron Technical should have been classified under A2924.21.1500 and the Diuron 80–WP under A3808.30.1000, the "A" prefix indicating that the merchandise is eligible for duty-free entry

pursuant to the Generalized System of Preferences ("GSP"), 19 U.S.C. § 2463 (Supp. V 1993 & 1994), as the product of a beneficiary developing country. Resolution of this dispute turns on whether chemicals imported into Malaysia and used in the production of the Diuron Technical and Diuron 80–WP underwent a dual substantial transformation. After trial on this issue, the Court finds that there was a dual substantial transformation and therefore holds that Customs erred in denying the subject merchandise duty-free treatment.

## STANDARD OF REVIEW

The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(a). Customs' classification decisions are reviewed *de novo*. *See Northwest Airlines, Inc. v. United States*, 22 CIT 797, 798, 17 F. Supp. 2d 1008, 1010 (1998). The factual determinations underlying classification decisions are afforded a presumption of correctness by 28 U.S.C. § 2639(a)(1) and the burden of proof is on the party challenging the classification. *Id.* Nevertheless, it is the Court's role to "consider whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984).

Title 19, section 2463(b)(1) of the United States Code provides for duty-free treatment of

> any eligible article which is the growth, product, or manufacture of a beneficiary developing country if—
>
> (A) that article is imported directly from a beneficiary developing country into the customs territory of the United States; and
>
> (B) the sum of (i) the cost or value of the materials produced in the beneficiary developing country * * * , plus (ii) the direct costs of processing operations performed in such beneficiary developing country * * * is not less than 35 percent of the appraised value of such article at the time of its entry into the customs territory of the United States.

19 U.S.C. § 2463(b)(1) (Supp. V 1993 & 1994). The term "produced in the beneficiary developing country" is defined to mean that "the constituent materials of which the eligible article is composed * * * are either (1) [w]holly the growth, product, or manufacture of the beneficiary developing country; or (2) [s]ubstantially transformed in the beneficiary developing country into a new and different article of commerce. 19 C.F.R. § 10.177(a) (1993 & 1994). A substantial transformation occurs when material undergoes "a processing that results in a new article having a distinctive name, character, or use." *Torrington Co. v. United States*, 8 CIT 150, 154, 596 F. Supp. 1083, 1086 (1984), *aff'd* 764 F.2d 1563 (Fed. Cir. 1985). "All three of these elements need not be met before a court may find a substantial transformation." *SDI Technologies, Inc. v. United States*, 21 CIT 895, 897,

977 F. Supp. 1235, 1239 (1997) (citing *Koru North America v. United States*, 12 CIT 1120, 1126, 701 F. Supp. 229, 234 (1988), *aff'd* 155 F.3d 568 (Fed. Cir. 1998)).

## BACKGROUND

Drexel imports herbicides and similar products which it markets under its own label. Trial Record ("TR.") 29–30. Diuron and DCU[1] are common names for dichloro diphenyl dimethyl urea, TR. 136, which acts as an herbicide by inhibiting the Hill Reaction[2] in plants, TR. 114. Diuron Technical is used to formulate other herbicides such as Diuron 4–L and Diuron 80–WP. TR. 33–34. Diuron 80–WP is a dry, powdered herbicide that the end-user mixes and applies with a spray tank. TR. 34–35. The merchandise at issue was purchased from Ancom, a Malaysian company not affiliated with Drexel. TR. 35–36.

At trial, Dr. David Barnes, a chemist who was an official with Ancom during the relevant time period, testified as an expert regarding the production of the Diuron products. The first step in production involves the reaction of imported dichlorophenyl isocynate and dimethylamine along with solvents to produce DCU. TR. 115. This is performed by Polytensides, a separate unit of Ancom. TR. 118–119. The reaction time in this process lasts half an hour and it then takes six to seven hours to remove the solvents. TR. 115–116. Two workers are required to run the DCU production plant. TR. 129. After the reaction, the DCU, which is in a molten state, is drained into 3′ by 3′ stainless steel trays and allowed to cool overnight, forming a crystalline cake weighing 100 to 150 pounds. TR. 103, 116. After cooling, the cake is broken up and stored in drums at the Polytensides plant. TR. 118.

When Ancom receives an order, it requisitions the DCU cake from Polytensides. TR. 119. The DCU cake is then put through a "sugar mill" to grind it into smaller particles to make it easier to handle. TR. 119–120, 132. During this initial grinding process silica and clay are added to the DCU to coat the surface of the particles and prevent them from agglomerating. TR. 120. Grinding would be impossible without the silica and clay. TR. 132. After this, the DCU is in a powder form. TR. 120. The powdered DCU is then placed in a ribbon blender and additional silica and clay are added until the mixture is 97.5 percent DCU. TR. 121. If Diuron 80–WP is being produced a dry surfactant is added during the blending in addition to the silica and clay. TR. 133. After blending, the mixture is air milled in an impact mill and run through a classifier whereby particles five microns or

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[1] The terms "Diuron" and "DCU" are interchangeable. TR. 99. At trial, counsel and the witnesses referred to the initial product as DCU and the finished product as Diuron. To maintain clarity the Court adopts the same use of these terms in this Opinion.

[2] The Hill Reaction is the process through which plants synthesize carbohydrates in the form of sap. TR. 113–114.

less in size are continuously taken off the top and larger particles fall to the bottom and are ground further until all the particles are five microns or less. TR. 122. This process takes eight to nine hours, TR. 134, and requires six to eight workers, TR. 134. The milling process is the final step in the production of Diuron Technical and Diuron 80–WP, and once this is complete the ground material is bagged and placed on pallets. TR. 133–134.

ARGUMENTS

In the present case, there is no dispute that the initial reaction of imported dichlorophenyl isocynate ("DCPI") and dimethylamine ("DMA") to produce the DCU cake was a substantial transformation. Def.'s Proposed Findings of Fact and Conclusions of Law Statement at 1. Nevertheless, since the DCPI and DMA were not from a beneficiary developing country, the DCU cake is not entitled to duty-free treatment under the GSP. *See Torrington*, 8 CIT at 153, 596 F. Supp. at 1085–86. The issue is whether the subsequent air milling of the DCU into fine particles, five microns or less in size, effected a second substantial transformation, thus enabling the value of the DCU cake to be counted toward the requirement set forth in 19 U.S.C. § 2463(b)(1) that 35 percent of the appraised value of the merchandise be derived from materials produced or processing operations performed in the beneficiary developing country.

Drexel's argument that a second substantial transformation did occur is based on Dr. Barnes's testimony that, while the intrinsic structure of the Diuron molecule remained unchanged through the manufacturing process, TR. 136, the properties of the material underwent "enormous changes" which made it an herbicide, TR. 137. Dr. Barnes explained that the grinding process freed valance bonds, thus enabling the Diuron to adsorb to a plant leaf in large enough quantities in order to act as an herbicide. TR. 138–140. Dr. Barnes explained that adsorption is "a chemical phenomenon" involving Van der Waal forces which bond molecules together with ionic and hydrogen bonds. TR. 139. Diuron is very insoluble in water, so without this fine grinding, not enough of the Diuron could be taken into the plant leaf to inhibit the Hill Reaction and kill the plant. TR. 140. Drexel argues that this testimony shows that the final air milled Diuron Technical and Diuron 80–WP products have a different character than the DCU.

Drexel also argues that the DCU is a separate commercial product. At trial, Mr. Robert Shockey, the founder of Drexel and currently its vice-president of finance, testified that between March 1993 and March 1994, Drexel sold a form of DCU to Alpha Chemical for use as an accelerator in making fiberglass. TR. 36. Drexel entered into evidence an office memorandum describing a container of 98 percent Diuron without media being entered in September 1993, a sample of which was acceptable to Alpha. Pl.'s Ex. 8 at 1. Mr. Shockey testified

that 98 percent Diuron without media was "as close to the pure DCU as we can get it." TR. 38. This is consistent with Dr. Barnes testimony that the DCU cake is roughly ground in the "sugar mill" when it first comes to the Ancom plant to make it easier to handle and that a minimum amount of silica and clay have to be added to make the grinding possible. TR. 132. Mr. Shockey further testified that the DCU sold to Alpha was a special shipment with less clay and silica than the Diuron it regularly imported because Alpha was having trouble using the regular Diuron. TR. 38. Although the purchase order from Alpha, dated June 11, 1993, described the product as "Diuron Technical Grade 97% same as sample send to us from lot," Pl.'s Ex. 8 at 6, Mr. Shockey explained that because of Drexel's prior dealings with Alpha they knew to supply it with the 98 percent Diuron without media (*i.e.* without clay and silica). Mr. Shockey speculated that Alpha had described the material incorrectly as Diuron Technical because it did not know what to call it otherwise. TR. 39. In addition to Mr. Shockey's testimony, Dr. Barnes testified that Ancom had sold DCU for use in paint manufacturing and for use in the water treatment industry. TR. 142–143.

Customs argues that there is not a second substantial transformation in the production of the Diuron products at issue, but that the DCU cake is merely an intermediate product. Customs places great emphasis on the fact that the grinding processes do not change the structure of the Diuron molecule, which is present in the initial DCU cake, and argues that this molecule is the essence of Diuron Technical and Diuron 80–WP because it is the component which inhibits the Hill Reaction. Although the grinding process enhances the ability of this molecule to act as an herbicide, it does not "change the intrinsic or inherent properties of the Diuron in the cake form." Def.'s Proposed Findings of Fact and Conclusions of Law Statement at 10.

Customs also argues that the DCU Drexel sold to Alpha was different from both the DCU cake produced at the Polytensides plant and the Diuron Technical and Diuron 80–WP at issue in this case because the product sold to Alpha was described as a fluffy powder but with very little clay or silica added. *Id.* at 6. Customs notes that the DCU cake was a solid rather than a powder, and the Diuron Technical and 80–WP had greater amounts of clay and silica added. *Id.* Customs also notes that Dr. Barnes testified that Ancom sold roughly ground DCU, not DCU cake, to the paint manufacturer and that the DCU that was sold was to be further ground with the paint pigment, similar to the grinding with clay and silica performed by Ancom, and would ultimately act as an algaecide and fungicide in the paint. *Id.* at 12.

## ANALYSIS

Prior decisions by this court in *Torrington Co. v. United States*, 8 CIT 150, 596 F. Supp. 1083 (1984), *aff'd* 764 F.2d 1563 (Fed. Cir.

1985), *Azteca Milling Co. v. United States*, 12 CIT 1153, 703 F. Supp. 949 (1988), *aff'd* 890 F.2d 1150 (Fed. Cir. 1989), and *Zuniga v. United States*, 16 CIT 459 (1992), *aff'd* 996 F.2d 1203 (Fed. Cir. 1993), are relevant to the present action. In *Torrington* the court held that there was a dual substantial transformation where wire from a nonbeneficiary developing country was processed first into sewing machine needle blanks and then into finished needles in Portugal. 8 CIT at 154, 596 F. Supp. at 1086. The court found that the character of the wire changed in its processing into the needle blanks, noting that it "has been cut to a specific length, beveled to meet specifications, and its circumference has been altered." *Id.* The court also found that the needle blanks were a "new and different article of commerce" based on two sales of the needle blanks by the plaintiff to a related company and instances where other companies imported similar merchandise. Furthermore, the court found that a second substantial transformation took place when the needle blanks were processed into industrial sewing machine needles by having an eye pressed into them, being mill flashed to remove excess material around the eye, and having a point placed on the needle along with identifying information regarding the size, type, and brand. 8 CIT at 155, 596 F. Supp. at 1087.

In *Azteca* the plaintiff alleged that three distinct intermediate products were formed during the production of tortilla and taco shell flour in Mexico. 12 CIT at 1156, 703 F. Supp. at 951. First, corn from the United States was cooked to form a product called nixtamal, which was then ground to form a second product called masa. The masa was then dried to form a third product referred to as tamale flour, which was finally sifted to form the tortilla and taco shell flour. The court found that

> [t]he products resulting at certain steps in plaintiff's patented process may be more refined than the constituent material of corn, but, nevertheless, are clearly recognizable as processed corn * * * * each product has not "lost the identifying characteristics of its constituent material."

12 CIT at 1158–59, 703 F. Supp. at 953 (quoting *Torrington Co. v. United States*, 764 F.2d 1563, 1569 (Fed. Cir. 1985)). Significantly, the court also found that the products formed at each stage of the production process were not "distinct 'articles of commerce' " because the plaintiff had not shown any commercial transactions or a market for them. Thus the court held that there had not been a dual substantial transformation. 12 CIT at 1159, 703 F. Supp. at 954.

Similarly, in *Zuniga* the plaintiff alleged that kiln furniture manufactured in Mexico was entitled to duty free treatment because the raw materials imported from the United States were substantially transformed into three intermediate products during the course of production. *Id.* at 459–60. The court rejected the plaintiff's argu-

ments, finding that the first alleged product, "castable," was never created in the manufacture of the goods at issue and that its functional equivalent was neither commercially recognized nor susceptible of trade. *Id.* at 464. The court found that the second alleged product, "casting slip," was not a new and different article of commerce, holding that "the simple addition of water and dispersing agents did not cause the casting slip to lose the "identifying characteristics" of its components." *Id.* at 465 (quoting *Azteca v. United States*, 890 F.2d 1150 (Fed. Cir. 1989)). Moreover, the court found testimony by the plaintiff's President and Chief Executive Office that he had denied one inquiry to sell casting slip insufficient evidence that this product was an article of commerce. The court was equally unimpressed with the plaintiff's argument that the casting slip was readily susceptible of trade based on testimony that competitors could derive the plaintiff's confidential formula from the slip and testimony that the casting slip was not saleable because it did not remain in suspension and could not be sold at a competitive price. *Id.* at 465–66. Finally, the court found that the plaintiff failed to produce evidence that the third alleged product, "greenware," lost the identifying characteristics of its component ingredients or that it had a different character or use, *id.* at 467 (citation omitted), and also failed to prove that it was a new article of commerce in light of unrebutted testimony that commercially sold greenware had a different formulation, *id.*

In the present action the Court finds the processing of the DCU into the Diuron Technical and 80–WP similar to the processing of the needle blanks into the finished needles in *Torrington.* Customs argues that the present case is more analogous to *Azteca* and *Zuniga* in that the identifying characteristic, namely the Diuron molecule, is equally present in the DCU cake and the final products. Nevertheless, the Court finds that in this instance the final product has gained new identifying characteristics in addition to the diuron molecule. The Court finds that the air milling process causes not only a physical change in the size of the particle, but also a chemical change as valance bonds are freed, enabling the Diuron molecule to adsorb to a plant leaf. TR. 138–139. Moreover, while the Diuron molecule is equally present both before and after the air milling process, the DCU "is useless as a herbicide," but "[t]he final product that comes out is a herbicide." TR. 137. Based on these findings, the Court concludes that there was a change in the character of the DCU in its processing into Diuron Technical and Diuron 80–WP.

The Court also finds that Drexel has demonstrated that the DCU is an article of commerce through the testimony regarding the sales by Drexel to Alpha and Ancom to the paint manufacturer. Although Customs makes much of the fact that the DCU that was sold in these transactions was not in cake form, but had been roughly ground in the "sugar milling" process, the Court is not persuaded

that this matters. Drexel has argued that it is the air milling process, by which the DCU is reduced to particles five microns or less in size, that transforms the DCU into an herbicide. Indeed, Dr. Barnes testified on cross-examination that prior to the time the DCU is air milled and run through the classifier it is not a different article of commerce from the original cake form. TR. 171–172. While Customs also contends that the ultimate use of the DCU in paint manufacturing is to be ground with the pigment and thereby impart its herbicidal properties to the finished paint, the Court finds this immaterial. The needle blanks that were sold in *Torrington* were likewise destined to be finished into needles, but they were found to be separate articles of commerce with a different character from the finished needles. 8 CIT at 154, 596 F. Supp. at 1087. Thus even if "sugar milled" DCU is ultimately sold to a manufacturer for further processing and ultimate use as an herbicide, it is nevertheless an article of commerce with a different character than the finished product.

Finally, the *Torrington* court noted that "the GSP was enacted to promote 'economic diversification, and export development' in less developed countries." 8 CIT at 156, 596 F. Supp. at 1087 (quoting S. Rep. No. 1298, 93d Cong., 2d Sess. 4, *reprinted in* 1974 U.S.C.C.A.N.7186, 7187). Based on the technical nature of the manufacturing operations performed by Polytensides and Ancom in Malaysia and the value of the machinery required, which was at least 1.5 million dollars, *see* TR. 130 and 134, the Court finds that the goals of the GSP have been satisfied in this instance.

## CONCLUSION

Taking the record as a whole, upon consideration of the testimony of the witnesses called at trial, the arguments made by counsel during trial, and the papers submitted post-trial, the Court finds that a dual substantial transformation occurred in the manufacture of Diuron Technical and Diuron 80–WP. Customs shall therefore reliquidate the entries at issue duty-free under HTSUS subheading A2924.21.1500 or A3808.30.1000.

(Slip Op. 03–61)

THOMAS J. AQUILINO, JR., JUDGE, ST. EVE INTERNATIONAL, INC., PLAINTIFF *v* UNITED STATES, DEFENDANT.

Court No. 03-00068

JUDGMENT

The plaintiff having commenced this case to contest notices on Customs Form 4647 to redeliver specified women's wear imported via Entry Nos. 655–1146249–5, 655–1151865–0 and 655–115–2655–4, as well as notices of liquidated damages for failure to comply with those redelivery demands; and the plaintiff having prayed for and obtained expedited trial and decision of its complaint; and the court having issued an opinion and order, slip op. 03–54, 27 CIT ____ , ____ F.Supp.2d ____ (May 15, 2003), denying certain requested relief but finding that plaintiff's goods bearing style numbers 65132, 65134, and 27–0180–3 are correctly classifiable under subheading 6109.10.0037 of the Harmonized Tariff Schedule of the United States (2002), textile category 352, based upon a fair preponderance of the evidence developed on the record, which thereby overcame the presumption of correctness on behalf of the U.S. Customs Service; and the court having ordered the parties to confer and present a proposed form of final judgment in accordance with slip op. 03–54; and counsel having complied with that direction; Now therefore, in accordance with slip op. 03–54, and after due deliberation, it is

ORDERED, ADJUDGED and DECREED that the Customs notices of redelivery (and for liquidated damages in connection therewith) in Entry Nos. 655–1146249–5, 655–1151865–0, and 655–1152655–4 each be, and they hereby are, vacated; and it is further hereby

ORDERED that the U.S. Bureau of Customs and Border Protection reliquidate the merchandise of Entry No. 655–1146249–5 under subheading 6109.10.0037 of the Harmonized Tariff Schedule of the United States (2002) at a rate of duty of 17.4 percent ad valorem and recover from the plaintiff any additional duties owed plus interest as provided by law.

(Slip Op. 03–62)

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS, FORMER EMPLOYEES OF SONOCO PRODUCTS CO., PLAINTIFFS *v.* UNITED STATES SECRETARY OF LABOR, DEFENDANT.

Court No. 02–00579

Defendant, the United States Secretary of Labor ("Labor"), moves to dismiss the action filed by Dorothy Fail ("Ms. Fail"), on behalf of the Former Employees of Sonoco Products Co. ("plaintiffs"), pursuant to USCIT R. 12(b)(1), for lack of subject matter jurisdiction. Plaintiffs commenced this action to appeal the negative determination issued by Labor, and published in the Federal Register on May 17, 2002, regarding plaintiffs' eligibility to apply for transitional adjustment assistance under the North American Free Trade Agreement-Transitional Adjustment Assistance Implementation Act ("NAFTA-TAA"). *See Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance and NAFTA Transitional Adjustment Assistance* ("*Negative Determination*"), 67 Fed. Reg. 35,140 (May 17, 2002). Labor contends that plaintiffs failed to seek judicial review within the sixty-day period prescribed by 19 U.S.C. § 2395(a) (2000) and 28 U.S.C. § 2636(d) (2000), which began to run on the date that the *Negative Determination* was published in the Federal Register and that, accordingly, this case should be dismissed.

Held: For the reasons stated below, Labor's motion to dismiss for lack of subject matter jurisdiction is granted.

[Labor's motion is granted. Case dismissed.]

(Dated June 9, 2003)

*Baker & McKenzie* (*Lynn S. Preece* and *Bart M. McMillan*) for Dorothy Fail and the Former Employees of Sonoco Products Co., plaintiffs.

*Robert D. McCallum, Jr.*, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Lucius B. Lau*, Assistant Director, and *Victoria L. Strohmeyer*) for the United States Secretary of Labor, defendant.

## MEMORANDUM OPINION

TSOUCALAS, *Senior Judge:* Defendant, the United States Secretary of Labor ("Labor"), moves to dismiss the action filed by Dorothy Fail ("Ms. Fail"),[1] on behalf of the Former Employees of Sonoco Products Co. ("plaintiffs"), pursuant to USCIT R. 12(b)(1), for lack of subject matter jurisdiction. Plaintiffs commenced this action to appeal the negative determination issued by Labor, and published in the Federal Register on May 17, 2002, regarding plaintiffs' eligibility to apply for transitional adjustment assistance under the North American Free Trade Agreement-Transitional Adjustment Assistance Implementation Act ("NAFTATAA"). *See Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance*

[1] Dorothy Fail filed this action on behalf of the Former Employees of Sonoco Products Co., *pro se*, on August 26, 2002. The Court, on February 25, 2003, granted plaintiffs' "Motion For Leave to Proceed *In Forma Pauperis*," and appointed Lynn Preece of Baker & McKenzie "to serve without fee and to appear generally on behalf of [the] plaintiff[s]." Order Granting Leave to Proceed *In Forma Pauperis*.

*and NAFTA Transitional Adjustment Assistance* ("*Negative Determination*"), 67 Fed. Reg. 35,140 (May 17, 2002). Labor contends that plaintiffs failed to seek judicial review within the sixty-day period prescribed by 19 U.S.C. § 2395(a) (2000)[2] and 28 U.S.C. § 2636(d) (2000), which began to run on the date that the *Negative Determination* was published in the Federal Register and that, accordingly, this case should be dismissed.

## JURISDICTION

The Court has jurisdiction to resolve this matter pursuant to 19 U.S.C. § 2395(c) (2000) and 28 U.S.C. §§ 1581(d), 2636(d) (2000).

## STANDARD OF REVIEW

The party seeking to invoke this Court's jurisdiction bears the burden of proving the requisite jurisdictional facts. *See McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1935). In this action, the burden of establishing jurisdiction falls on the plaintiffs. The Court will accept as true all facts alleged in the plaintiffs' pleadings. *See Corrpro Cos., Inc. v. United States*, No. 01–00745, slip op. 03–59 at 4 (CIT June 4, 2003) (not yet published in Federal Supplement or CIT reporters). "A party, or the court *sua sponte*, may address a challenge to subject matter jurisdiction at any time, even on appeal." *Booth v. United States*, 990 F.2d 617, 620 (Fed. Cir. 1993) (citations omitted and emphasis in original).

It is well established that the United States, as sovereign, is immune from suit, unless it consents to be sued. *See United States v. Mitchell*, 445 U.S. 535, 538 (1980) (citing *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). A waiver of such sovereign immunity "must be unequivocally expressed" by statute and will be "strictly construed * * * in favor of the sovereign." *Lane v. Pena*, 518 U.S. 187, 192 (1996) (citations omitted). The Court will construe ambiguities concerning the statutory language regarding the waiver of sovereign immunity in favor of immunity. *See United States v. Williams*, 514 U.S. 527, 531 (1995) (citing *United States v. Nordic Vill.*, Inc., 503 U.S. 30, 33 (1992)).

## DISCUSSION

### *I. Background*

On February 26, 2002, Sonoco Products Company ("Sonoco"), located in Lincolnton, North Carolina, filed a NAFTA-TAA petition on behalf of seventy-four affected workers for trade adjustment assis-

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[2] Section 2395(a) permits "[a] worker[ or] group of workers * * * aggrieved by a final determination of the Secretary of Labor[,] * * * *within sixty days after notice of such determination* [to] commence a civil action in the United States Court of International Trade for review of such determination." 19 U.S.C. § 2395(a) (emphasis added).

tance under Section 221(a) of the Trade Act of 1974, as amended, 19 U.S.C. § 2271(a) (2000). *See* Admin. R. Pub. File ("Admin. R.") at 2–3; *Investigations Regarding Certifications of Eligibility to Apply for NAFTA Transitional Adjustment Assistance*, 67 Fed. Reg. 16,447, 16,448 (Apr. 5, 2002). On May 3, 2002, Labor made a negative determination regarding plaintiffs' eligibility to apply for NAFTA transitional adjustment assistance and notice of such determination was published in the Federal Register on May 17, 2002. *See* Admin. R. at 21–26; *Negative Determination*, 67 Fed. Reg. at 35,142. On August 26, 2002, the Clerk of the Court of the United States Court of International Trade received and deemed filed a letter written by Ms. Fail, on behalf of the Former Employees of Sonoco, requesting an appeal of Labor's *Negative Determination*. *See* Def.'s Mem. Supp. Mot. Dismiss. ("Def.'s Mem.") at Exs. A & C. This appeal was filed one hundred and one days after Labor's decision was published in the Federal Register. Section 2395(a) of Title 19 of the United States Code requires that an action challenging a determination made by Labor be commenced *within sixty days after notice of such determination is rendered*. *See* 19 U.S.C. § 2395(a) (emphasis added). The sixty-day period begins to run when the final determination is published in the Federal Register. *See* 29 C.F.R. § 90.19(a) (2002); *Kelly v. Sec'y, U.S. Dep't of Labor*, 812 F.2d 1378, 1380 (Fed. Cir. 1987) (stating that "where the question is the calculation of the time limitations placed on the consent of the United States to suit, a court may not * * * take a liberal view of that jurisdictional requirement and set a different rule for *pro se* litigants").

*II. Contentions of the Parties*

Although the procedural facts are uncontested, plaintiffs argue that the Court should consider additional relevant facts and apply the doctrine of equitable tolling. *See* Pls.' Mem. Resp. Def.'s Mot. Dismiss ("Pls.' Resp.") at 1. Such additional facts include the following:

> 1. In January of 2002[,] Sonoco management announce[d] in a meeting with employees that it will close its manufacturing plant in Lincolnton, North Carolina.
>
> 2. In January or February 2002, Sonoco, without informing the affected workers of any details, explains to the workers that it intends to file a NAFTA–TAA petition* * * * [Subsequently, Sonoco files such a petition.] According to Ms. Fail, the workers are never informed by Sonoco (or any other person) that the TAA petition was filed* * * *
>
> * * * * * * *
>
> [3.] During spring and summer of 2002, certain of the displaced Sonoco workers, including Dorothy Fail, understand that Sonoco has filed a petition on their behalf concerning special unemployment and retraining benefits. Dorothy Fail makes regular visits to the local state employment office in or-

> der to, among other things, demonstrate that she is still actively looking for work (in order to continue receiving ordinary state unemployment benefits) and to explore job opportunities. While she is at this office, Ms. Fail regularly inquires whether there is any information concerning the petition filed by Sonoco. Ms. Fail also regularly makes inquiries of other displaced Sonoco workers. Ms. Fail's efforts to keep informed of any developments result in no information.
>
> [4.] In August of 2002, Dorothy Fail, while at the local state employment office, is told that the office has received news that the petition filed by Sonoco was denied by Labor.
>
> [5.] Dorothy Fail, along with certain other former employees of Sonoco, immediately begin to research their rights and obligations. Upon discovering that a negative determination can be appealed to this Court, three former Sonoco employees, [including] Dorothy Fail * * * complete a TAA petition, and Dorothy Fail signs and sends with the petition a cover letter to this Court in which she requests "appeal seeking judicial review of [Labor's] *[N]egative [D]etermination** * * * * " The letter [to the Court] is sent within one or two weeks of Dorothy Fail being informed that the NAFTA–TAA petition for the former Sonoco employees has been denied.

Pls.' Resp. at 2–4 (emphasis added). According to plaintiffs, the Court should exercise its ability "to judiciously and fairly employ the doctrine of equitable tolling" in order to save this action from dismissal due to untimeliness. *Id.* at 5.

Plaintiffs analogize the facts of this case to those established in *Former Employees of Quality Fabrication, Inc. v. United States Sec'y of Labor*, No. 02–00522, 2003 Ct. Int'l Trade LEXIS 27, at *2–*6 (CIT Mar. 14, 2003), and argue that equitable tolling is appropriate in this case since "no worker or worker representative was aware of any of the details concerning the petition" filed on their behalf by Sonoco. Pls.' Resp. at 6–7. Specifically, plaintiffs contend that Sonoco never provided them with notice regarding Labor's *Negative Determination*, and that Ms. Fail relied on inadequate information from local, state employment officials. *See id.* at 7. According to plaintiffs, these officials, who are essentially "partners with Labor in administering the NAFTA–TAA program[,] never explained the publication rule to Dorothy Fail, despite her repeated requests for information concerning the petition." *Id.* Instead, Ms. Fail maintains that although state officials repeatedly told her that they would inform her of Labor's decision regarding her petition "during one of her regular visits to the employment office," she was actually notified eighty days "after publication of the decision in the Federal Register." *Id.* "[O]nce Ms. Fail learned of the negative determination, she and certain other former Sonoco workers immediately began their own research to understand and exercise their right to judicial review of

Labor's decision." *Id.* Since the letter initiating this appeal was filed with the Court within sixty days from the date Ms. Fail deems she received notice of Labor's *Negative Determination*, plaintiffs argue that they exercised the necessary due diligence required to apply the doctrine of equitable tolling. *See id. at* 7–8.

Labor contends that plaintiffs have not met their burden of presenting evidence or arguments that would warrant equitable relief. *See* Def.'s Reply Pls.' Opp'n Mot. Dismiss ("Def.'s Reply") at 1. Although Labor recognizes that equitable tolling "will afford a late-filing party an opportunity to file out of time[,]" it is applied "where 'the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass.' " *Id.* at 2 (quoting *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990)). Since neither of these conditions exist in the case at bar, Labor argues that plaintiffs did not meet the equitable tolling standard. *See* Def.'s Reply at 3–4. Moreover, Labor contends that plaintiffs did not exercise due diligence in requesting the appropriate information regarding their petition and that, accordingly, the Court should deny jurisdiction. *See id.* at 6–7.

*III. Analysis*

The Court in *Quality Fabrication*, 2003 Ct. Int'l Trade LEXIS 27, at *10 n.8, explained that a plaintiff must "claim equitable considerations [and] exercise due diligence in bringing their claim" in order to preserve their right to have a court review Labor determinations. Applying this two-part test to the facts of the case at bar, the Court finds that plaintiffs failed to meet all the requirements demanded from plaintiffs who pray for equitable remedies. *See Irwin*, 498 U.S. at 96 (stating that "[f]ederal courts have typically extended equitable relief only sparingly * * * [and that the Supreme Court] ha[s] generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights").

Notwithstanding plaintiffs' arguments that equitable remedies should be extended in the case at bar in accordance with the test articulated by *Quality Fabrication*, the Court finds that the efforts exhibited by the Sonoco plaintiffs to gather information about their NAFTA–TAA petition fails to approach the level of diligence put forth by the plaintiffs in *Quality Fabrication*, or that of a hypothetical reasonable person who was notified that his company would file a NAFTA–TAA petition on his behalf. *See Former Employees of Siemens Info. Communication Networks, Inc. v. Herman, Sec'y, United States Dep't of Labor*, 24 CIT 1201, 1208, 120 F. Supp. 2d 1107, 1114 (2000) (stating that "[w]hether a plaintiff has acted with due diligence is a fact-specific inquiry, guided by reference to the hy-

pothetical reasonable person") (citing *Dodds v. Cigna Sec., Inc.*, 12 F.3d 346, 350 (2d Cir. 1993); *Valverde v. Stinson*, 224 F.3d 129, 134 & n.4 (2d Cir. 2000)).

In *Quality Fabrication*, the plaintiffs mailed their NAFTA–TAA petition to Labor, while a former employee of Quality, Margaret Miller continuously checked the DOL website from the time of filing. *See Quality Fabrication*, 2003 Ct. Int'l Trade LEXIS 27, at *2. Miller did so because she was affirmatively instructed by government officials that the DOL website was the appropriate source of information. *See id.* at *13. Miller subsequently emailed her regional Labor office to inquire about her petition. *See id.* at *2. Two days later, Miller received an email response from Labor stating " 'these things take time.' " *Id.* Miller, however, pursued this action pro-actively in that she contacted: (1) two local Representatives from Congress; (2) the State of Pennsylvania Department of Labor Trade Adjustment Representative; (3) a state legislator; and (4) Labor's NAFTA–TAA office located in Washington, D.C. *See id.* at *2–*4. In addition to these extensive efforts, Miller repeatedly contacted her regional Labor office for a period of four months, and received no response. *See id.* at *4. In the case at bar, the plaintiffs' efforts were limited to Ms. Fail's infrequent inquiries with her local employment office and with other displaced Sonoco workers. *See* Pls.' Resp. at 3. The purpose of Ms. Fail's three visits to the state employment office, within the relevant time frame, was never strictly to request information about the Sonoco petition.[3] Therefore, the Court finds that Ms. Fail's inquiries as to the status of the Sonoco petition only with the local state employment office do not meet the due diligence requirement imposed on plaintiffs who seek to argue equitable remedies. *Compare Siemens*, 24 CIT at 1202–05, 120 F. Supp. 2d at 1109–11 (holding that plaintiffs' allegations of inducement and trickery were without merit and rejecting arguments of equitable tolling), *with Quality Fabrication*, 2003 Ct. Int'l Trade LEXIS 27 at *2–*5 (holding that the plaintiff's extensive efforts to inquire as to the status of the relevant NAFTA–TAA petition were sufficient to satisfy the due diligence standard). Plaintiffs, acting in a reasonably prudent manner, should have requested information from additional sources, such as Labor's NAFTA–TAA office, or from Sonoco who filed the NAFTA–TAA petition on their behalf, instead of strictly depending on casual inquiries as to the status of the Sonoco petition with the local employment office. A reasonable plaintiff acting with due diligence would have investigated additional sources of information. *See Siemens*, 24 CIT at 1208, 120 F. Supp. 2d at 1114 (stating that "[w]hether a plaintiff has acted with due diligence is a fact-specific

[3] The primary reason Ms. Fail visited the local Labor office on May 29, 2002, July 1, 2002, and July 16, 2002, was to search for further employment. *See* Def.'s Reply at Ex. 1; *see also* Pls.' Resp. at 3 ¶ 5.

inquiry, guided by reference to the hypothetical reasonable person") (citations omitted).

Second, and more importantly, there was no misconduct by any government official that can be construed as having induced or tricked Ms. Fail or any other Sonoco employee into missing the sixty-day deadline prescribed by 19 U.S.C. § 2395(a). Although the plaintiffs do not affirmatively state that Labor, in any way, induced or tricked them into missing the deadline, they do suggest that Ms. Fail had to rely on inadequate information provided by officials at the local state employment office who never clarified the publication rule. *See* Pls.' Resp. at 7. However, the fact that plaintiffs relied on the wrong source of information, independent of any affirmative representations from the government, does not shift blame to the government or prove that the plaintiffs were tricked or induced into missing the filing deadline. Unlike the plaintiffs in *Quality Fabrication*, who sought information from a variety of government sources, and received specific assurances from those sources that Labor's website would provide the appropriate notification instead of the Federal Register, the Sonoco plaintiffs simply failed to diligently inquire as to their NAFTA–TAA petition.

## CONCLUSION

After weighing the facts of this case, the Court finds that plaintiffs failed to act with due diligence. The government's actions cannot be construed as inducing or tricking Ms. Fail or any other Sonoco employee into missing the relevant sixty-day deadline. The Court will not apply the doctrine of equitable tolling in a situation where the plaintiffs simply did not try hard enough to access the information necessary to file a timely appeal. Judgment will be entered accordingly.

(Slip Op. 03–63)

BEFORE: HONORABLE RICHARD K. EATON, INTERCONTINENTAL MARBLE CORPORATION, PLAINTIFF *v.* UNITED STATES, DEFENDANT.

COURT NO. 98–02961

## JUDGMENT

Upon considering both plaintiff's and defendant's motions for summary judgment, the memoranda and accompanying materials in support thereof, and the oppositions and replies and supporting materials thereto; upon other papers and proceedings had herein, in-

cluding this court's opinion and order dated April 30, 2003, and the proposed judgment order filed by the parties with the court on May 30, 2003; it is hereby:

ORDERED that plaintiff's motion for summary judgment be, and hereby is, granted in its entirety, and

ORDERED that defendant's motion for summary judgment be, and hereby is, denied in its entirety, and

ORDERED that judgment is hereby entered in favor of plaintiff; and

ORDERED that the subject merchandise at issue in this matter is properly classified as marble slabs under subheading 6801.91.05 of the Harmonized Tariff Schedule of the United States. The United States Bureau of Customs and Border Protection is ordered to take all necessary action to reliquidate the entries involved herein consistent with this order; and

ORDERED that this action is dismissed.

# Index

*Customs Bulletin and Decisions*
*Vol. 37, No. 26, June 25, 2003*

## *Bureau of Cutoms and Border Protection*

### General Notices



***CUSTOMS RULINGS LETTERS AND TREATMENT***



## *U.S. Court of International Trade*

### Slip Opinions



*U.S. G.P.O.:2003-496-409:80002